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In the Supreme Court of the United States

RANDELL A. RILEY and LEE T. KUNIMITSU,

Petitioners,

v.

ECKARD BRANDES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit err or abuse its discretion when it rejected Petitioners' request for certification of state law questions and upheld the District Court's prediction that the Hawaii Supreme Court would recognize a cause of action for breach of duty of loyalty, predicting its scope, statute of limitations, and enunciating available remedies?

2. Did the Ninth Circuit deprive Petitioners' substantive due process rights when it affirmed the award of disgorgement of Petitioners' profits for a breach of an implied contract where there was no evidence of consequential damages sustained by Respondent?

3. By disregarding pertinent, if not controlling, Hawaii Supreme Court cases, did the Ninth Circuit fail to review the case *de novo* in the light of the rule of independent review enunciated in *Salve Regina*?

PARTIES TO THE PROCEEDING

The following entities are parties to the proceeding in the court below:

Randell A. Riley and Lee T. Kunimitsu were involved in the Ninth Circuit Appeal Case No. 00-15474 and are petitioners in this case. They filed bankruptcy but the stay is lifted for Case No. 00-15474. They were also involved in Case No. 01-1730 but the stay was not lifted for Case No. 01-1730. Both cases were consolidated at the time of the Ninth Circuit Opinion.

Garnishee Kamaania Pumping, Inc., A Hawaii Corporation, was involved in the Ninth Circuit Appeal, Case No. 01-1730, but is not a party to this petition.

Defendant Kamaaina Pumping, A Hawaii General Partnership, did not appeal to the Ninth Circuit.

Eckard Brandes, Inc. was involved in the Ninth Circuit Appeal Cases No. 00-15474 and No. 01-1730 and is the respondent in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners RANDELL A. RILEY ("RILEY") and LEE T. KUNIMITSU ("KUNIMITSU") respectfully petition this court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's findings of fact and conclusions of law (Gillmore, J.) in this case may be found at Appendix B., *infra*, at p.p.12a-27a. The findings of fact and conclusions of law regarding the certification of state law questions, duty of loyalty, statute of limitations, disgorgement remedy, attorney fees and prejudgment interests may be found at Appendices C-E, *infra*, at pp.28a-101a. The court of appeals' opinion (Schroeder, CJ., Appendix A pp. 1a-12a) affirming the district court judgment is published at 338 F.3d 1082. The court of appeals' order denying rehearing and suggestion of a rehearing *en banc* (Appendix F, *infra*, at p.p. 102a-103a), as amended (Appendix G, *infra*, p.p.104a-105a) are not otherwise published.

JURISDICTION

The Court of Appeals entered its opinion on August 11, 2003, and subsequently denied a rehearing and suggestion for a rehearing *en banc* on October 22, 2003, as amended on October 31, 2003. The application to extend time to file a petition for a writ of certiorari was granted until February 19, 2004. Case No. 03A560. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS

1. Rule 13(a) of the Hawaii Rules Appellate Procedure, states:

> RULE 13. Certification of question of Hawaii law by federal courts.
>
> (a) When certified. When a federal district or appellate court certifies to the Hawaii Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court may answer the certified question by written opinion.

The statutory language of the following important statutes involved in this case is set forth in Appendix J, *infra*, p.p. 113a-123a:

> *Haw.Rev.Stat.*, §103D-704 (Exclusivity of remedies).
> *Haw.Rev.Stat.*, §103D-705 (Solicitations or awards in violation of law).
> *Haw.Rev.Stat.*, §103D-709 (Administrative proceedings for review).

Haw.Rev.Stat., §602-5 (Jurisdiction and powers).
Haw.Rev.Stat., § 607-14 (Attorneys' fees in actions in the nature of assumpsit, etc.)
Haw.Rev.Stat., § 636-16 (Awarding interest).
Haw.Rev.Stat., § 657-1 (Six years).
Haw.Rev.Stat., § 657-7 (Damage to persons or property).

STATEMENT OF THE CASE

The underlying facts are very simple. Two at-will employees, RILEY and KUNIMITSU, formed a Hawaii general partnership and bid against their employer, Respondent ECKARD BRANDES, INC. ("EBI"), while they were employed. Their partnership was awarded a contract with the County of Hawaii. There was no evidence of actual or concrete loss by EBI, however, there was evidence of actual profits by RILEY and KUNIMITSU after their termination from employment. The District Court entered a judgment against RILEY and KUNIMITSU on the breach of loyalty claim and disgorged past wages and profits after their termination from employment.

EBI is in the business of repairing and maintaining sewer pipes and other structures that convey sewage, debris, and rainwater. EBI employed RILEY as a superintendent and KUNIMITSU as a laborer. (p.2a). Both were at-will employees. (p.58a at fn.5). There was no finding of fact that there was any confidential or trust relationship between the parties. (p.p.13a-18a). Nor was there a finding of fact that solicitation of business was within the scope of their employment. *Id.* While still employed by EBI, RILEY

and KUNIMITSU formed their own partnership, Kamaaina Pumping, and competed against EBI for a County of Hawaii project. (p.p.14a-15a). Kamaaina Pumping submitted the lowest bid and the county awarded it the contract. (p.15a). EBI then learned that RILEY and KUNIMITSU were the sole partners of Kamaaina Pumping and terminated their employment on June 17, 1996. (p.20a at fn.4).

This litigation began when RILEY and KUNIMITSU filed an overtime wage action in state court against EBI, claiming violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. (p.17a). EBI removed the case to federal court and filed a counter-claim for breach of the duty of loyalty. (p.17a).[1] The only evidence that the District Court relied on granting a summary judgment was that during the course of employment, RILEY and KUNIMITSU bid against their employer EBI and Kamaaina Pumping entered into a contract with the County of Hawaii. (p.p.50a-55a). There was no evidence of a fiduciary relationship. *Id.* The District Court granted a summary judgment for EBI on the employees' FLSA claims and the duty of loyalty claim. (p.18a). In the trial for damages, EBI in open court stated that it would not seek consequential damages but disgorgement of profits. (p.107a). The District Court concluded that the appropriate remedy for the employees' breach of the duty of loyalty was disgorgement of profits made by

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[1] Of the four counts in EBI's Counterclaim, Count I (Breach of Contract), Count III (Misappropriation of Trade Secrets), and Count IV (Interference with Business Expectancy) were stipulated to be dismissed in favor of RILEY and KUNIMITSU against EBI. (p.106a). The judgment against RILEY and KUNIMITSU in favor of EBI was entered on Count II (Breach of Fiduciary Duty of Loyalty) alone.

RILEY and KUNIMITSU while competing with EBI. (p.p.21a-22a) There was no evidence or findings of facts of actual or concrete losses by EBI. (p.p.13a-18a). The period of disloyalty ended June 17, 1996, (p.20a at fn.4), but the District Court did not disgorge RILEY and KUNIMITSU's 1996 income from Kamaaina Pumping. (p.p.23a-25a). Inexplicably, the District Court disgorged RILEY and KUNIMITSU's 1997 income from Kamaaina Pumping less $62,400 each for the value of the labor. (p.25a). The District Court also denied Plaintiff's overtime claim or set-off due to the defense of breach of loyalty. (p.20a). The District Court denied requests to certify questions of state law.[2] (p.77a & p.79a). It entered judgment granting relief in favor of EBI.[3] The

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[2] By a motion, the following questions were requested to be certified at the District Court on October 18, 1999.

1. Is an employee's duty of loyalty recognized in at-will employment situations in the State of Hawaii for employees who are not officers, directors, shareholders, management officials or supervisors of the employer?

2. Assuming that the employee's duty of loyalty exists, under what cause of action, contract, tort or equity, is a breach of employee duty raised?

3. Assuming that the employee's duty of loyalty exists, what statute of limitations appl[ies] to breach of employee's duty of loyalty?

4. Assuming that the employee's duty of loyalty exists, what [are] the criteria to distinguish the type of employee conduct deemed to be a breach of the duty of loyalty?

Petitioners requested another question to be certified at the District Court on October 28, 1999.

1. Does the exclusivity of remedies [provision] under Hawaii Revised Statutes §103D-704 preclude a person aggrieved in connection with the solicitation or award of a contract by a State of Hawaii governmental body from bringing a private cause of action for damages against the successful bidder or those who act in concert with the successful bidder?

[3] The District Court's Amended Judgment states that the award "represent[s] damages" to EBI indicating it was attempting to

special master then issued a special master's report (Appendix E, *infra*, at p.p. 81a-101a) in violation of an automatic stay and after the stay terminated, the District Court awarded attorneys' fees and prejudgment interest for the disgorged profits to EBI. (p.107a). The employees appealed.

On August 11, 2003, the Ninth Circuit affirmed the District Court's ruling. (Appendix A, *infra*, at p.p.1a-11a). The Ninth Circuit panel ruled the Hawaii Supreme Court would recognize a cause of action for breach of duty of loyalty in an employment contract context, such duty applies to low-level employees, the six-year statute of limitations applies, and available remedies were disgorgement, prejudgment interests on disgorged amount, and attorney fees and costs. *Id.* The petition for rehearing and suggestion of rehearing *en banc* was denied, by the Ninth Circuit. (Appendix "F", *infra*, at p.p.102a-103a; Appendix "G", *infra*, at 104a-105a).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition because:

- The Court of Appeals, by rejecting certification of state law questions and predicting the recognition of a new cause of action, enunciating its nature, statute of limitations, and remedies, has far departed from the spirit of comity and federalism as to call for an exercise of this Court's supervisory powers; and;

- The Courts of Appeals has no uniform formula or test as to when to certify state law questions and

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label disgorgement (RILEY and KUNIMITSU's profits) as EBI's consequential damages. (Appendix H, *infra*, at p.108a)

this court should fashion and settle a standard in a manner consistent with the federalism scheme, the abstention doctrine, and the "rule of independent review"; and;

- The Court of Appeals' opinion that disgorgement remedy was available when there was no evidence of actual or concrete loss directly conflicts with *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998)(inequity of disgorgement in lieu of consequential damages); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)(punitive damages must correlate to special damages) as to call for an exercise of this Court's supervisory powers; and;

- The Court of Appeals, by disregarding pertinent, if not controlling Hawaii cases, has far departed from "the rule of independent review" enunciated in *Salve Regina* as to call for an exercise of this Court's supervisory powers.

ARGUMENT

A.

THE NINTH CIRCUIT PANEL SHOULD HAVE CERTIFIED STATE LAW QUESTIONS TO THE HAWAII SUPREME COURT

Petitioners request for the certification of the following questions to the Hawaii Supreme Court.

1. Whether an independent cause of action for employee's breach of duty of loyalty is recognized in at-will employment situations in the State of Hawaii for

employees who are not officers, directors, shareholders, or management officials of the employer?

2. Assuming that such cause of action is recognized;

i) What is the nature of the cause of action, contract, tort, or equity?

ii) What statute of limitations applies?

iii) What are the available remedies, consequential damages, disgorgement, prejudgment interests, and/or attorney fees and costs?

iv) What are the criteria to distinguish the type of employee conduct deemed to be a breach of the duty of loyalty?

3. Whether disgorgement of profits is barred by the doctrine of exhaustion of legal remedies in Hawaii when one elects to waive consequential damages?

4. Whether disgorgement of profits violates substantive due process rights under the Hawaii Constitution when there was absence of consequential damages?

A federal court sitting in diversity applies the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary pursuant to the *Erie* doctrine. *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.E.2d 190 (1991). Two major purposes of the *Erie* doctrine are "discouragement of forum-shopping and the avoidance of inequitable administration of justice." *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). The courts of appeal must review *de novo* district courts' determination of state law. *Salve Regina, supra.* ("rule of independent review"). In absence of a state supreme court precedent, federal courts exercising diversity jurisdiction may look to

"other state-court decisions, well-reasoned decisions from other jurisdictions, any other available authority" to determine how state courts would resolve the issue. *Santana v. Ziglog*, 95 F.3d 780, 783 (9th Cir. 1996). However, decisions by the state court of appeals providing guidance and instruction are not to be disregarded in the absence of convincing indications that the state supreme court would hold otherwise. *Burns v. International Insurance Co.*, 929 F.2d 1422, 1424 (9th Cir. 1996); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1996). Federal appellate courts have an obligation to consider whether novel state-law questions should be certified. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 62, 76-79, 117 S.Ct. 1055, 137 L.Ed. 2d 170 (1997); *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 219 (1974). Certification today covers territory once dominated by a deferral device called "Pullman abstention." *Arizonans*, at 75-76; *see also*, *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

In *Eckard Brandes v. Riley*, 338 F.3d 1082 (9th Cir. 2003), the Ninth Circuit panel upheld the District Court's prediction that the Hawaii Supreme Court would recognize a cause of action for breach of duty of loyalty, predicting its scope, statute of limitations, and available remedies. The panel's decision to reject certification of state law questions was inconsistent with another panel's decision in *Kremen v. Cohen*, 325 F.3d 1035 (9th Cir. 2003). There appears to be no uniformity within the Ninth Circuit as to when to certify state law questions. The inquiry when to certify state law questions involves exceptional importance as it relates to the spirit of comity and federalism. Resolution of this issue has nationwide application as it

may affect every diversity case. Some Circuits have recently elaborated as to when certification is proper with different formula. *E.g.*, *Allstate Ins. Co. v. Mendards, Inc.*, 285 F.3d 630 (7th Cir. 2002); *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001); *Allstate Ins. Co. v. Serio*, 261 F.3d 143 (2nd Cir. 2001). Certification patterns vary widely among federal courts and are largely ad hoc. Clark, *Ascertaining the Laws of Several States: Positivism and Judicial Federalism After Erie*, 145 U.Penn.L.Rev. 1459, 1549 (1997). This writ asks this court to review and clarify the certification process in light of the federalism scheme, the abstention doctrine, and the "rule of independent review."

Petitioners submit that in reviewing the rejection of certification, appellate courts should make the following inquiry: 1) Whether the state law questions are significant, involving public concerns and state public policy ramifications rendering them appropriate to give the state courts first opportunity to address the issue?; 2) Whether the questions are outcome determinative of the case?; 3) Whether the questions are novel and unpredictable?; 4) Whether the federal court disregarded any authorities and issues?; 5) Whether the federal court decision may have actual forum-shopping effect?; 6) Whether federal constitutional issues can be avoided by certification?; 7) Whether judicial economy can be served in light of the state and federal courts' caseload?; and 8) Who is the party responsible for bringing state law questions to federal courts?

1. The Ninth Circuit should have invoked the certification process because the state law questions presented significant issues including public policy analysis all of which were outcome determinative of the case.

Unlike the United States Supreme Court which has the prerogative to be final arbiter of disputes arising under federal law brought before any courts, state supreme courts do not always have the opportunity to rectify erroneous[4] state law interpretations by federal courts. Inability of state supreme courts to supervise federal courts concerning disputes arising under state law, can lead to erroneous decision being developed by federal courts undermining the stability of state law and prerogative of state supreme courts. The *Pullman* abstention doctrine, and more recently, the certification process have developed to provide state courts an opportunity to enunciate definitive interpretations on matters of state law in federal court cases.

Recognition of a cause of action under Hawaii law and its nature[5] and remedies[6] are normally issues,

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[4] As a practical matter, prediction of state law can be a difficult task and certification has the benefit of sparing federal court the difficult chore of having to determine state law. *See, e.g. MaCarthy v. Olin Corp.*, 119 F.3d 148, 158-59 & n.3 (2nd Cir. 1997) (Cakaresi, J. dissenting)(describing the Second Circuit's difficulties in predicting state law).

[5] The Petitioners argued that because the remedy of disgorgement was only available for breach of tortious duty, EBI's claim was barred by the two-year tort statute of limitations. *Hawaii Revised Statutes*, §657-7; *TSA International Limited v. Shimizu Corporation*, 92 Haw 243, 264, 990 P.2d 713, 734 (1999)(when the claims did not involve 'monetary damages" based upon the non-performance of a contractual or quasi-contractual obligation, the

only reserved for the Hawaii Supreme Court, the definitive expositor of Hawaii law. Naturally, recognition of a cause of action entails the extensive analysis of state public policy considerations and ultimately prioritizing often competing public policies.[7] When an issue involves novel and vital concerns such as the recognition of a cause of action, deference should be made to state courts. *See, Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, 88 S. Ct. 1753, 20 L. Ed. 2d 835 (1968)(When a state law issue is one of vital concern and a truly novel one, sound judicial administration

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claims does not arise under contract and sounds in tort). The Ninth Circuit in its opinion rejected this view opining that the nature of breach of duty of loyalty was in assumpsit and the six-year statute of limitations pursuant to *Hawaii Revised Statutes*, §657-1 applied. Furthermore, the Ninth Circuit affirmed imposing prejudgment interests pursuant to *Haw.Rev.Stat.*, § 636-16 on the disgorged profits even when these profits were obtained in span of approximately one and a half year after the termination of employments. The attorney fees were awarded based on fee award for assumpsit actions. *Haw.Rev.Stat.*, § 636-14. The recommendation to award prejudgment interests and attorney fees wase made by the special master during the automatic stay in bankruptcy (p.107a). This made Petitioners ineligible for Chapter 13 relief.

[6] The Petitioners argued that because disgorgement in effect took away Petitioners' profits to be rewarded to EBI, the claims were barred by the exclusively provision of Hawaii Procurement Code, *Hawaii Revised Statutes*, §103D-704. The Ninth Circuit in its opinion rejected this view opining that the issues in this case were not within the ambit of the Hawaii Procurement Code labeling the case as an employment contract case rather than a bid protest case.

[7] Traditionally, state public policies have been the grounds for abstention. *See, Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S. Ct. 1236; 47 L. Ed. 2d 483 (1976)("Abstention- is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.")

requires that the parties in a pending case be given the benefit of the same rule of law which will apply to all parties.) Federal courts should not pass advance judgment on the state court's priority in its policy. *Kremen*, at 1038. The state supreme courts have the experience and instinct for the history of and idiosyncratic problems within the state. State appellate courts often have to wait until appropriate cases come before them. By certification, federal courts[8] give the state supreme courts a first opportunity[9] to express their policies affording them the right to define their own substantive law. Here, the Ninth Circuit's decision deprived the Hawaii Supreme Court of its first opportunity to express its policies regarding the duty of loyalty. Implied terms of employment contracts have been certified by a different Ninth Circuit panel in the past, *Asumus v. Pac Bell*, 159 F.3d 422 (9th Cir. 1998), and the panel's rejection of certification conflicted with other cases.

Federal courts should avoid creating potentially erroneous federal precedents on significant state law and policy issues. In particular, the Ninth Circuit panel did not address the assignment of error that the Petitioners were only "at-will employees." Under Hawaii law, as matter of public policy, employment at-will contracts are treated differently from ordinary

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[8] Even this court itself has certified questions of state law. *E.g.*, *Dresner v. Tallahassee*, 375 U.S. 136, 84 S. Ct. 235, 11 L. Ed. 2d 208 (1963); *Aldrich v. Aldrich*, 375 U.S. 75, 84 S. Ct. 184, 11 L. Ed. 2d 141(1963); *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978); *Fiore v. White*, 528 U.S. 23, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999).

[9] A state court has indicated that by certification state courts enjoy the opportunity to rule on significant state law issues where it might not otherwise have the chance. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 fn.10 (Tex. 1992).

contracts in that there are no implied covenants of good faith and fair dealings. *Best Place, Inc. v. Penn America Ins. Co.*, 82 Haw. 120, 124, 920 P.2d 334, 357 at fn. 5 (1996) (*citing Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982)). The Hawaii Supreme Court may have believed this issue to be important. *See, Francis v. Lee Enterprise*, 89 Haw. 234, 971 P.2d 707 (1999) (overruling "tortious breach of contract" theory in employment at-will contracts). It may have believed the duty of loyalty depends upon actual relationship. Petitioners were blue collar laborers cleaning drywell and sewers and soliciting customers was not within the scope of their employments. There was no evidence of a fiduciary relationship. The Hawaii Supreme Court also may have believed that employers should not hold at-will employees to a duty comparable to a duty of an attorney in an attorney-client relationship as set forth in *Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1 (1973), when employers can freely terminate employees for no reason. It may also have justly believed that an employee's duty of loyalty should correspond to the level of his or her duty as an agent[10], and compensation and these are factual issues not appropriate for summary judgment.

Furthermore, the Hawaii Supreme Court may have believed that the disgorgement issue raised important public policy concerns. Due process concerns for disgorgement of profits given no evidence of actual

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[10] For example, under New Hampshire law, a breach only occurs when undertaken by a supervisor, manager, director, officer or other person "holding a position of trust and confidence" with the employer and no cause of action for breach of the duty of loyalty can lie against a law firm's secretary who is not a supervisor, manager, director, or officer of the employee. *White v. Ransmeier & Spellman*, 950 F.Supp. 39, 43 (D.N.H. 1996).

concrete loss sustained by EBI, may raise the eyebrow of Hawaii Supreme Court justices from a state constitutional viewpoint. The Ninth Circuit panel did not even address Petitioners assignment of error that the remedy to disgorge profits was not available when there was an opportunity for consequential damages. Hawaii has long adhered to the doctrine of exhaustion of legal remedies. This case is not a federal securities fraud action where disgorgement remedies are available by statutory law. This lawsuit is a state common law dispute. While the appeal was pending, the Hawaii Supreme Court enunciated the prerequisites for a complainant to satisfy when seeking an equitable remedy. *Beneficial Hawaii, Inc. v. Kida*, 96 Haw. 289, 30 P.3d 895 (2001). The Hawaii Supreme Court has stated that one must claim that 1) the claim is of an equitable nature and 2) admit of a remedy in a court of equity only. *Id.* at 312, at 918. Thus, it would appear unless EBI had admitted that it had no remedies other than disgorgement, it would not have been able to avail itself of disgorgement remedy. The ordinary interpretation of *Kida* would be that equitable remedies are not available for assumpsit actions. Here, EBI did not admit having exhausted the legal remedy and elected in open court to abandon consequential damages and to seek instead disgorgement of profits. (p.107a). The Hawaii Supreme Court may have considered that the basic equitable principle mandates that courts of equity should not act in vain so as to substitute disgorgement in lieu of consequential damages providing a windfall to a party. In any event, the Hawaii Supreme Court should have had the opportunity to address these issues.

2. Certification should have been made to avoid the practical effect of fostering forum shopping.

Certification produces a precedent which is a definitive explication of state law that is reliable and controlling. Certification process promotes long-term efficiency by providing uniform and consistent results. *Lehman Bros. v. Schein*, 416 U.S. at 391("[i]t does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.") It also deters forum-shopping. In practicality, when federal courts' interpretation involves issues such as recognition of causes of action, this may effectively create federal common law defeating the purposes of *Erie*. Federal courts should not generate federal common law. *Gasperini v. Center for Humanities*, 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). This court has expressed concerns about practical effect of creating a dual system. *See*, *Salve Regina*, at 234 ("[B]y denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district court's state-law determinations create a dual system of enforcement of state created rights, in which the substantive rule applied to a dispute may depend on the choice of forum.") The practical effect of the panel's ruling is that if the remedy sought is for disgorgement arising out of breaches of contracts, Hawaii plaintiffs will run to the federal court rather than state courts because it must follow the Ninth Circuit. It will be unlikely that Hawaii plaintiffs will elect to go to state courts by choice, when they are bound by pertinent, if not controlling, Hawaii precedents cited below which were disregarded by the Panel. In particular, divergent developments of affirming the award of disgorgement for breach of an

implied contract, will be controversial because disgorgement does not normally arise out of a legal cause of action because it is an equitable remedy.

- *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982). In the opening brief, this case was submitted for the proposition that an implied duty of good faith and fair dealing was not recognized in an employment at-will contract and such contracts were treated differently from other contracts.

- *Francis v. Lee Enterprise*, 89 Haw. 234, 971 P.2d 707 (1999). In the opening brief, this case was submitted for the proposition that under Hawaii law there was no hybrid cause of action in tort and contract in an employment at-will contract context. It was also submitted for the proposition that when disgorgement was sought the cause of action must sound in tort.

- *Beneficial Hawaii, Inc. v. Kida*, 96 Haw. 289, 30 P.3d 895 (2001) (enunciating modern application of the doctrine of exhaustion of legal remedies). In the motion for summary reversal before the Ninth Circuit, this case was submitted to support the proposition that disgorgement was unavailable when consequential damages were not sought.

3. Certification is proper to avoid the federal constitutional issue.

The decision also did not address Petitioners' federal constitutional objection that disgorgement was awarded regardless of any lack of evidence of actual or concrete loss by EBI. It is Petitioners' position that their substantive due process rights were violated when the District Court took their profits despite

EBI's inability to show it suffered any actual or concrete damages. *See, infra*, Argument, Section B. When the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question, federal courts should ordinarily abstain from passing on the federal issue. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941). Because certification has the same purposes as those of the *Pullman* abstention doctrine, certification is proper. *See, Malabed v. North Slope Borough*, 335 F.3d 864 (9th Cir. 2003). In fact, this court has certified questions of state law when there was an opportunity to avoid federal issues. *Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978); *Fiore v. White*, 528 U.S. 23, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999). And this court has also recommended invoking the certification process. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212, 80 S. Ct. 1222, 4 L. Ed. 2d 1170 (1960)("The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision.").[11]

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[11] Certification supplants *Pullman* abstention as the preferred device to obtain definitive explanation of state law from state courts. *See, Arizonans for Official English*, 520 U.S. at 75 ("Certification today covers territory once dominated by a deferral devise called 'Pullman abstention' . . .) But, even when there is no federal question, the certification may be proper. *Lehman v. Schein, supra.* Thus, the certification is not restricted unlike the limitation to abstention enunciated in *Meredith v. Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943).

4. In determining whether state law questions are predictable or unpredictable the appellate court must review de novo the contrary authorities disregarded by the District Court.

Where there is any doubt as to state law, federal courts should certify questions to state supreme courts to avoid making unnecessary *Erie* "guesses." However, if there is no doubt, then they should not be certified. *Hill*, *supra*. Although certification should be reviewed by an abuse of discretion standard as a whole, the subissue whether state law is unpredictable should be reviewed *de novo* so as to not effectively defeat the independent review requirement set forth in *Salve Regina*. Disregarded Hawaii cases and issues here display importance in addressing all authorities and issues to determine whether the state law questions are predictable.

De novo review of the predictability issue comports with the purpose of *Erie*. Comparatively, state lower courts have a keen instinct as to predicting how state supreme courts would rule based on their actual experience of cases being affirmed, reversed, or remanded. In contrast, because federal district courts cannot be affirmed, reversed or remanded by state supreme courts, they have the freedom to challenge existing state case law rather than being simply predictable. This gives the unsupervised federal district courts a broader freedom to usurp novel and attractive issues. Furthermore, the district courts often must quickly resolve complicated legal questions without the benefit of reflection or extensive information. *See*, *Salve Regina*, at 232 (citation omitted). Also, the district courts may actually just abstain from addressing significant contrary issues out

of comity and federalism, by ignoring the issues. This may be a practical method for achieving comity, but unjust for parties whose voices were never answered on significant state law issues and raises serious due process concerns. *De novo* review is necessary to assure that there are no *Erie* guesses, no authorities disregarded, and no issues avoided. This is consistent with the supervisory power given to federal appellate courts.

Federal appellate courts should review *de novo* not only pertinent cases and issues that support the decision, but also contrary authorities and arguments. Here, the Ninth Circuit panel allowed a great amount of deference to the District Court's interpretation of state law. The panel disregarded pertinent, if not controlling, Hawaii Supreme Court cases set forth above and gave more weight to the Restatement. Under *de novo* review, these Hawaii cases or "data" cannot be just disregarded as if they did not exist as did the District Court. Disregarding pertinent or contrary cases is analogous to excluding or limiting evidence before findings of fact. If these Hawaii cases had been considered, the conclusion would have been that the issues were unpredictable, if not in favor of Petitioners' contentions. The Hawaii Supreme Court does not blindly follow the restatement. *E.g., Kohn v. West Hawaii Today, Inc.*, 65 Haw. 584, 656 P.2d 79 (1982) (rejecting comment g to Section 580B of Restatement (Second) of Torts). State-by state survey shows that employees' duty of loyalty, its scope, statute of limitations, remedies are a developing area of law which cannot be simply restated. *Employee Duty of Loyalty, a State by State Survey 2d Ed.*, Bureau of National Affairs, Inc. (1999). Unless the issues raised by these cases are properly addressed and disposed, the so-

called "independent review" requirement articulated in *Salve Regina* is not satisfied.

5. Certification should be invoked for judicial economy and be made against the party bringing the state law claims to federal courts.

Disregard of the Hawaii cases shows that the certification to the Hawaii Supreme Court would have been more economic because the decision creates new unresolved issues. *See, Arizonans, supra,* at 76 ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save "time, energy, and resources and help build a cooperative judicial federalism."); *Nat'l Educ. Ass'n v. Lee County Bd. of Pub. Instruction,* 467 F.2d. 447, 449 (5th Cir. 1972)(Certification "minimiz[es] or eliminate[es] the confusion, uncertainty and judicial friction inherent in a system of federalism that frequently forces Federal Judges to assume-often with extreme reluctance – a decisional rule that properly belongs to their brethren on the State bench.") By certification, arguments can be submitted before state supreme court justices who drafted the pertinent precedents. The state supreme court justices will be familiar with delicate issues involved in past cases. Federal Courts of Appeals are also burdened with appeals, if the issue can be certified at the District Court level, it would be economic. Unlike California, Hawaii does accept certification at the District Court level. *See, Francis, supra.* Petitioners promptly[12] requested certification at the District Court

[12] A court has indicated that the timing of the certification request is one factor. *Nieves v. Univ. of P.R.*, 7 F.3d 270, 278 & fn.15 (1st Cir. 1993) (rejecting request for certification first raised on appeal).

level before the order granting summary judgment on liability. (p.75a).

Furthermore, in this case Petitioners did not bring the state law questions before the federal court.[13] In this case, EBI removed the case from the Hawaii court to the District Court bringing these state law questions to the federal court. In other words, it was EBI's choice of forum. RILEY and KUNIMITSU are not responsible for bringing state law issues to the federal court. In all fairness, federal courts should resolve the certification issue against the parties who are responsible for bringing state law questions to the federal courts. Such rule will have the effect of diminishing forum-shopping.

The certification process also provides equilibrium to prevent the potential abuses in diversity jurisdiction. Diversity jurisdiction appears to have initially developed to prevent the parochialism of state courts against out-of-state residents. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 n.6, 115 S.Ct. 1043, 130 L. Ed. 2d 1024 (1995). However, the establishment of diversity jurisdiction has also created a potential risk of federal court abuses. The federal court's unintentional bias may come from the justices just having practiced in states other than the forum state. Since the Court of Appeals rulings cannot be appealed to the state supreme courts, unless there is certification process there is no practical mechanism to prevent federal

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[13] A court has indicated it will be less receptive to certification request from a party who chose to invoke federal jurisdiction. *Fisher v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 8 (1st Cir. 1988). In this case EBI removed this case to federal court and then filed a counterclaim.

courts' bias, abuse, or mistake. Certification achieves the proper check and balance and fosters comity between the judiciaries.

The answers to the certified question by the Hawaii Supreme Court will create a "law of the case" which binds the parties as well as others. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 333 (5th Cir. 1999)("Ordinarily, a state court's answer to a certified question is final and binding upon the parties between whom the issue arose. (citations omitted) Such an answer, therefore, generally becomes "the law of the case" (citations omitted). [F]urther, because we consider the state court's answer to be binding in the proceedings between the parties to the certified case, that answer becomes the law of this circuit and binding upon parties who were not parties to the certified case.(citations omitted)").

B.

THE AWARD OF DISGORGEMENT FOR A BREACH OF IMPLIED CONTRACT WITHOUT EVIDENCE OF CONCRETE LOSS VIOLATES SUBSTANTIVE DUE PROCESS

Should this court be inclined to reject the certification request, Petitioners request that the panel address the federal constitutional question as to whether the award of disgorgement for a breach of an implied contract was a substantive due process violation when there was no evidence of concrete or actual loss. *See, Montana v. Crow Tribe of Indians*, 523 U.S. 696, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998)(inequity of disgorgement in lieu of consequential damages); *State Farm Mut. Automobile Ins. Co. v.*

Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (punitive damages must correlate to consequential damages). Although the issue was raised in the Opening Brief in the Ninth Circuit by citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), the Ninth Circuit did not address this issue in its decision. Petitioners submit that the Ninth Circuit's ruling upholding the disgorgement award conflicts with *Montana* and *Campbell* because no evidence of concrete loss existed in this case and disgorgement is inequitable and punitive in nature. The Ninth Circuit overlooked the material fact that there was no evidence of "concrete loss" sustained by EBI. The question involves exceptional importance as it relates to substantive due process rights.

The award of disgorgement rather than consequential damages for a breach of contract violates due process because such award results in a windfall to the alleged victim. *See, Campbell, supra.* (compensatory damages are intended to redress a plaintiff's loss, while punitive damages are aimed at different purposes of deterrence and retribution). The major distinction between consequential damages and disgorgement is that the former concerns victim's loss where in the latter concerns wrongdoer's profits. Farnworth, *Your Loss My Gain? The Dilemma of the Disgorgement Principal in Breach of Contract*, 94 Yale L.J. 1339, 1341 (1985). Like punitive damages, disgorgement often results in a windfall to another and cannot be simply equated with restitution or unjust enrichment. Reviewing the decision as it relates to "unjust enrichment," the panel followed the District Court in assuming that EBI's loss of the potential contract with the County of Hawaii resulted in EBI's

losses. The loss of the contract with the County of Hawaii by itself is not competent evidence of any actual losses in terms of monetary damages. In this case, at trial, EBI never produced any evidence that it had sustained consequential damages ("actual loss" or "concrete loss"). There are no findings of facts regarding any actual or concrete losses, and as a matter of law, EBI sustained no actual loss. For all we know, EBI may have entered into a more lucrative contract as a result of not having to service the County of Hawaii. EBI simply did not prove its actual losses at trial. When there was no evidence of actual losses, the award of disgorgement by District Court was an arbitrary deprivation of property. RILEY and KUNIMITSU's disgorged 1997 income was income earned after the termination of their employment with EBI in 1996. The bid award was for the term ending on March 31, 1997, but the District Court disgorged all income of 1997. There was no rationality in awarding disgorgement.

Under Hawaii law, the equitable theory of unjust enrichment assumes that there was a wrongful enrichment "at the expense of another." *Small v. Bandenhop*, 67 Haw. 626, 636, 701 P.2d 647, 654 (1985). Here, there was no evidence of EBI's actual losses. Petitioners' profits derived from the fact that they had provided actual labor services to the County of Hawaii by cleaning drywells and sewers. In addition, their past wages are from work performed on behalf of EBI. In other words, Petitioners did not wrongfully take money from EBI at the expense of EBI, and retained that money. This case is not a case where disgorgement may be appropriate due to kickbacks employees received. EBI's proper cause of action may have been a tortious interference with a prospective contract, but that claim was dismissed.

Furthermore, the recognition of disgorgement as remedy for breach of an implied contract will result in inequitable results. In an ordinary breach of contract case, a cause of action arises when there is a breach and such breach proximately results in damages. If disgorgement is available under a breach of contract theory, the cause of action would be extended to those without damages. It would also encourage opportunistic victims to wait until the wrongdoer's profits accumulate and ask for disgorgement just before the end of the contractual statute of limitations. There would be no incentive to mitigate damages resulting in inequitable results where an opportunistic victim seeks windfalls from a breach of contract. Some victims may also enter into more lucrative deals and obtain new profits in addition to disgorgement. In this case, prejudgment interest pursuant to *Haw.Rev.Stat.*, §636-16 was irrationally calculated from the time when Petitioners were not even receiving any profits.

Addressing the punitive nature of disgorgement in *SEC v. Drexel Bumham Lambert, Inc.*, et al., 956 F.Supp. 503, 507 (S.D.N.Y. 1997), the court specifically noted that, "[t]he disgorgement remedy is not intended to compensate investors, rather, it is intended to deprive the violator of unjust enrichment, thereby furthering the objectives of the securities laws." *Id.* The court went on to distinguish between the remedy of disgorgement and restitution by stating: "While some cases have equated the two remedies, [citations omitted], they are distinct in that restitution aims to make the damaged persons whole, while disgorgement aims to deprive the wrongdoer of ill-gotten gains. *Id.*(*citing SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993)). This position was later affirmed in *Huffman* where the United States Court of Appeals of the Fifth

Circuit affirmed:

> ". . . disgorgement is not precisely restitution. Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. [citations omitted] It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims for the wrongful acts, as restitution does." [citation omitted] *Id.*

Ordinarily, unjust enrichment is equated with actual losses. *See, Hateley v. SEC*, 8 F.3d 653, 655 (9th Cir. 1993)(disgorgement order was unreasonable and excessive when it amounted to more than ten times the amount of their unjust enrichment).

In rejecting the Ninth Circuit's award of disgorgement when damages were available, in a federal law context, this Court has expressly adopted a view that disgorgement should not be awarded when consequential damages may have been available. *Montana*, 523 U.S. at 718 (where an Indian Tribe sought disgorgement rather than compensatory damages and deliberately proved no damages, disgorgement was exorbitant, and therefore, inequitable remedy).

Under Hawaii law, courts cannot award punitive damages for mere breaches of employment contracts. *Francis*, 89 Haw. at 240. Ordinarily, when consequential damages are not sought, equitable remedies are not available due to the doctrine of exhaustion of legal remedies. *Kida*, 96 Haw. at 23.

Normally, consequential damages are considered to be the remedy for breach of contract. Thus, the award of disgorgement rather than consequential damages is an inequitable remedy because it is punitive in nature and especially when it is disproportionate to the actual damages of a breach of contract.

C.

THE PANEL DISREGARDED PERTINENT, IF NOT CONTROLLING HAWAII CASES AND DID NOT REVIEW THIS CASE DE NOVO

The highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement are to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179; 85 L. Ed. 139 (1940). In rendering its opinion Panel did not even cite the pertinent Hawaii cases, *Parner*, *Francis*, *Beneficial Hawaii, Inc.* to distinguish or address them and just ignored these cases as if they did not exist. (p.p. 1a-11a). If the Ninth Circuit had been unwilling to certify questions of state law regardless of these cases, it had the duty to address them in its opinion. These cases are data to formulate conclusions of law. Ignoring data is analogous to excluding evidence for admission. "[S]tate law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: 'with the aide of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina*, at 227 (citing *Merdith, supra.*) The opinion is also unclear as to whether the Panel used an independent review

standard and did not defer the conclusion of law to district court opinion. (p.p. 1a-11a). Failure to address these cases is evidence that the Panel failed to conduct an independent review. At the very least it should raise a presumption that the panel faltered to conduct a *de novo* review. When *de novo* review is compelled, no form of appellate deference is acceptable. *Salve Regina College* at 238. The Panel cannot ignore these cases and must address them when Petitioners raised these cases. Alternatively, Petitioners ask that writ be granted to see if remand is appropriate.

CONCLUSION

There was no evidence of any actual or concrete losses sustained by EBI, nevertheless, the District Court disgorged Petitioners' profits to impose sanctions which amounts to a level of criminal fines. In doing so, the District Court recognized a new independent cause of action with hybrid remedies of equitable and legal remedies as if it was fashioning a cause of action particularly for this case. The District Court and Ninth Circuit all disregarded controlling, if not pertinent, Hawaii law. Currently, except for a writ to this court and certification, there is no mechanism to supervise the federal courts and to prevent a misinterpretation of state law questions as it cannot be reversed by the state courts. Substantive due process means a fundamentally fair process and Petitioners deserve the same fair process they could have obtained in state courts.

Petitioners petition for the issuance of the writ of certiorari to determine whether certification to the Hawaii Supreme Court is appropriate. In addition, the issue of a disgorgement remedy should also be certified

in addition to original certification requests made prior to the judgment made at the District Court. This case is significant because it concerns federalism and its ruling may affect every diversity case in every jurisdiction. Should the certification request be rejected, Petitioners request this Court to address the federal constitutional issue. The award of disgorgement for a breach of an implied contract when there was no evidence of actual or concrete losses is irrational, arbitrary, and an unconstitutional deprivation of one's property in violation of due process rights. Alternatively, the Petitioners ask that writ be granted so that this court can remand the case to the Ninth Circuit to address the disregarded Hawaii cases mentioned above.

Wherefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

***Eckard Brandes, Inc. v. Riley et al.*, 338 F.3d 1082 (9th Cir. 2003)(Ninth Circuit Case Nos. 00-15474 & 01-1730, August 11, 2003)**
Opinion by C.J. Mary Schroeder

Nos. 00-15474 & 01-1730

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECKARD BRANDES, INC.,
Counter-claimant-Appellee,

v.

RANDELL A. RILEY; LEE T. KUNIMITSU,
Counter-defendants-Appellants, and KAMAAINA PUMPING, a Hawaii general partnership,
Counter-defendant.

and

All related claims.

Argued and Submitted,
November 5, 2002 -- Honolulu, Hawaii
August 11, 2003, Filed

COUNSEL: Junsuke Otsuka, Law Offices of Gary Y. Shigemura, Honolulu, Hawaii, for the counter-

defendants-appellants.

Ernest H. Nomura, Kobayashi, Sugita & Goda, Honolulu, Hawaii, for the counter-claimant-appellee.

JUDGES: Before: Mary M. Schroeder, Chief Judge, Arthur L. Alarcon, and Raymond C. Fisher, Circuit Judges. Opinion by Chief Judge Schroeder.

OPINION BY: Mary M. Schroeder

OPINION:

SCHROEDER, Chief Judge:

This run of the mill Fair Labor Standards Act case quickly became the unusual case of a claimed breach of the duty of loyalty owed by employees to their employer under state law, when the employees set up a competing business. The district court recognized that employees owe a duty of loyalty under Hawaii law to refrain from competing with their employer, and the court ordered the employees, Randell A. Riley and Lee T. Kunimitsu, to disgorge their profits to the employer, Eckard Brandes, Inc. ("EBI"). We affirm because the employer's claim represents a classic violation of the duty of loyalty as recognized by Section 393 of the Restatement (Second) of Agency.

I. Facts and Procedural History

Appellee EBI is in the business of repairing and maintaining sewer pipes and other structures that convey sewage, debris, and rainwater. EBI employed Riley as a superintendent and Kunimitsu as a laborer. While still employed by EBI, Riley and Kunimitsu

formed their own partnership, Kamaaina Pumping, and competed against EBI for a County of Hawaii project. Kamaaina Pumping submitted the lowest bid and the county awarded it the contract. EBI then learned that Riley and Kunimitsu were the sole partners of Kamaaina Pumping and terminated their employment.

This litigation began when Riley and Kunimitsu filed an overtime wage action in state court against EBI, claiming violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. EBI removed to federal court and filed a counter-claim for breach of the duty of loyalty. The district court granted summary judgment for EBI on the employees' FLSA claims and the duty of loyalty claim. It concluded that the appropriate remedy for the employees' breach of the duty of loyalty was disgorgement of profits Riley and Kunimitsu made while competing with EBI. It entered judgment granting that relief and then awarded attorneys' fees and prejudgment interest to EBI. The employees appeal.

II. Breach of the Duty of Loyalty

The primary issue on appeal is whether EBI may bring a claim under Hawaii law against its employees for directly competing against it. In deciding state law claims, we apply Hawaii law as we believe the Hawaii Supreme Court would apply it. *See Gravquick A/S v. Trimble Navigation Int'l, Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). We conclude that Hawaii law would recognize EBI's claim against Riley and Kunimitsu for their breach of the duty of loyalty.

It is clear under Hawaii law that employees owe their employer a duty of loyalty. *See Stout v. Laws*, 37 Haw. 382, 392 (1946). Although the Hawaii Supreme Court has not explicitly stated that the employer may bring a claim for a breach of this duty, Hawaii courts have recognized the authoritative nature of the Restatement (Second) of Agency. *See, e.g., Hawai'i Hous. Auth. v. Uyehara*, 77 Haw. 144, 883 P.2d 65, 72 (Haw. 1994). We thus believe that the Hawaii Supreme Court would follow the Restatement in finding that such a cause of action exists.

The Restatement recognizes that "an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." Restatement (Second) of Agency § 393. This duty extends to employees. *See* Restatement (Second) of Agency § 429 cmt. a. Although an employee "is entitled to make arrangements to compete" with his employer prior to terminating the employment relationship, the employee is not "entitled to solicit customers for such rival business before the end of his employment." Restatement (Second) of Agency § 393 cmt. e. The Restatement also provides that the employer may maintain an action for a violation of the duty of loyalty. *See* Restatement (Second) of Agency § 399.

This is the classic case the Restatement envisions. The material facts are not disputed. While still employees of EBI, Riley and Kunimtisu formed their own partnership, Kamaaina Pumping. Merely preparing to compete does not itself breach the duty of loyalty. Restatement (Second) of Agency § 393 cmt. e. When the partnership submitted a bid for a County of Hawaii drywell and culvert cleaning project, however,

Riley and Kunimtisu engaged in conduct equivalent to the solicitation of customers. *Id.* EBI was the only other bidder, and it ultimately lost the contract to Kamaaina Pumping. Moreover, Riley and Kunimitsu executed the contract with the County of Hawaii while still employees at EBI and without EBI's knowledge. It is therefore clear from the record that Riley and Kunimitsu breached their duty of loyalty by directly competing with EBI.

Riley and Kunimitsu argue that EBI nevertheless has no claim against them because they were only low-level employees. Nothing in the Restatement indicates, however, that ordinary employees have no duty of loyalty. Further, other courts have recognized the liability of employees who are not officers or directors. *See, e.g., Eaton Corp. v. Giere*, 971 F.2d 136, 141 (8th Cir. 1992) (concluding that a product engineer breached his duty of loyalty by soliciting his employer's customers for himself). Thus, Riley and Kunimitsu are liable.

The employees also contend that any claim EBI had is barred by Hawaii's two-year statute of limitations for torts. The district court, however, correctly applied Hawaii's six-year contractual statute of limitations to EBI's duty of loyalty claim. The six-year statute of limitations applies to "actions for the recovery of any debt founded upon any contract, obligation, or liability." Haw. Rev. Stat. § 657-1. The Hawaii Supreme Court has held that the words "obligation" and "liability" encompass actions that are hybrids of tort and contract and that primarily involve an injury to intangible property interests. *See Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1, 5, 55 Haw. 677 (Haw. 1973). A claim for a

breach of an employee's duty of loyalty is such a hybrid. Under the Restatement, the employer has a cause of action either in tort or for breach of contract when the employee violates the duty. *See* Restatement (Second) of Agency § 403 cmt. b. Thus, section 657-1(1)'s six-year limitation period applies to EBI's claim for the breach of the duty of loyalty. *See* Higa, 517 P.2d at 4-5 (applying the six-year limitations provision to a claim for legal malpractice that "generally arises out of a contractual relationship between the parties").

III. Remedy of Disgorgement

The employees also challenge the district court's order requiring them to disgorge their profits from the County of Hawaii contract. We hold that the district court properly ordered disgorgement.

The Restatement supports the district court's award of disgorgement as a remedy for breach of the duty of loyalty. It provides, "If an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." Restatement (Second) of Agency § 403. This rule applies where the agent makes a profit from competing with the principal. *See* Restatement (Second) of Agency § 403 cmt. a. Although there are few reported cases addressing the appropriate remedy, those we have found have also required employees to turn over profits received as a result of breaching their duty of loyalty. *See Chernow v. Reyes*, 239 N.J. Super. 201, 570 A.2d 1282, 1285 (N.J. Super. Ct. App. Div. 1990); *W. Elec. Co. v. Brenner*, 41 N.Y.2d 291, 360 N.E.2d 1091, 1094, 392 N.Y.S.2d 409 (N.Y. 1977).

The employees contend that the district court erred in awarding disgorgement, arguing that EBI's exclusive remedy is the procedure in the Hawaii Public Procurement Code, Hawaii Revised Statutes chapter 103D, governing procurement. This argument is unpersuasive. Although section 103D-704 of the Procurement Code provides that the Code is the "exclusive means" available for persons aggrieved in connection with the award of public contracts, Hawaii courts do not read the Procurement Code so literally or so broadly. See *CARL Corp. v. Haw. Dep't of Educ.*, 85 Haw. 431, 946 P.2d 1, 29 (Haw. 1997). EBI's claim for breach of the duty of loyalty is not the type of grievance with which the Procurement Code is concerned. The Procurement Code addresses how Hawaii agencies are to administer public bidding to ensure that the procurement system functions fairly and with adequate accountability and fiscal responsibility. *See id.* EBI's claim does not concern that process, nor will the outcome of the case have any effect on the award of this contract. The Procurement Code is not relevant to EBI's claim.

The employees similarly contend that the district court lacked primary jurisdiction over this dispute. Under the doctrine of primary jurisdiction, the court may suspend review of a claim if its resolution involves issues that have been placed within the jurisdiction of an administrative body. *See United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 62, 1 L. Ed. 2d 126, 77 S. Ct. 161, 135 Ct. Cl. 997 (1956). This dispute is not within the jurisdiction of any state administrative agency because, as we have seen, it does not involve the administration of the contracting process. There is no primary jurisdiction in any state agency.

IV. Certification to the Hawaii Supreme Court

The employees contend the district court erred in refusing to certify the duty of loyalty issue to the Hawaii Supreme Court. The decision to certify a question to a state supreme court rests in the "sound discretion" of the district court. *Louie v. United States*, 776 F.2d 819, 824 (9th Cir. 1985) (internal quotations omitted). In the absence of controlling Hawaii Supreme Court precedent, the district court properly looked to decisions from other jurisdictions, other relevant Hawaii cases, and the Restatement to determine how a Hawaii court would resolve these issues. *See Santana v. Zilog, Inc.*, 95 F.3d 780, 783 (9th Cir. 1996). There was no abuse of discretion.

V. Award of Attorneys' Fees and Prejudgment Interest

We affirm the district court's award of attorneys' fees to EBI. Under Hawaii law, attorneys' fees are available in "all actions in the nature of assumpsit." Haw. Rev. Stat. § 607-14. In Hawaii, "assumpsit" is an action that allows for the recovery of damages arising from quasi-contractual obligations. *See Schulz v. Honsador, Inc.*, 67 Haw. 433, 690 P.2d 279, 281 (Haw. 1984). EBI's claim for breach of Riley and Kunimitsu's duty of loyalty is such an action because it arises from and is a breach of their contractual employment relationship with EBI. *See Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 886 (9th Cir. 2000) (under Hawaii law, a breach of fiduciary duty claim is in the nature of assumpsit when based on the non-performance of contractual obligations); *Blair v. Ing*, 96 Haw. 327, 31 P.3d 184, 189-90 (Haw. 2001) (concluding that an action is in the nature of assumpsit where the claim arises out of the

contractual relationship); *Schulz*, 690 P.2d at 282. Here, the implied employment contract creates the duty that gives rise to the cause of action. The duty breached is not a duty that would exist independent of the terms of any contract. Moreover, as we have previously discussed, the Restatement provides that an employer has a cause of action either in tort or for breach of contract for a breach of the duty of loyalty by his employee. This case is therefore unlike *TSA International Limited v. Shimizu Corporation*, 92 Haw. 243, 990 P.2d 713 (Haw. 1999). There the court held the action was not in the nature of assumpsit because the fraud and breach of fiduciary duty claims merely related to a contract and did not involve any breach of contract. *See id.* at 734.

The employees argue that this is not an assumpsit action because the remedy awarded, disgorgement, is not a proper remedy for a breach of contract. Hawaii law recognizes, however, that its law of assumpsit evolved in part to prevent defendants' unjust enrichment. *See Hong v. Kong*, 5 Haw. App. 174, 683 P.2d 833, 841 (Haw. Ct. App. 1984). It is widely recognized that disgorgement is a remedy intended to prevent a wrongdoer from unjust enrichment. *See, e.g., SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993); 1 Dan B. Dobbs, *Law of Remedies* § 4.5(5) (2d ed. 1993) (stating that disgorgement is limited to the amount of the unjust enrichment). We therefore hold that the district court did not err in awarding EBI attorneys' fees.

We also affirm the district court's award of prejudgment interest to EBI. Hawaii law authorizes the court to award interest commencing with the date

the injury first occurred in tort cases, and the date the breach occurred for contract cases. *See* Haw. Rev. Stat. § 636-16. It is also within the court's discretion to award prejudgment interest where the issuance of the judgment is materially delayed. *See Kalawaia v. AIG Haw. Ins. Co.*, 90 Haw. 167, 977 P.2d 175, 180 (Haw. 1999). The district court found that EBI was injured from January 1996, when the employees first breached their duty of loyalty, through June 1996. Judgment was not entered in this case for four years. Under Hawaii law, the district court has broad discretion in awarding prejudgment interest, and an award must be upheld unless it "clearly exceeded the bounds of reason." *Schmidt v. Bd. of Dirs. of the Ass'n of Apartment Owners of the Marco Polo Apartments*, 73 Haw. 526, 836 P.2d 479, 483-84 (Haw. 1992). This award was not unreasonable.

VI. Appeal Number 01-17307

Appeal number 01-17307 is from the grant of a temporary restraining order that has now expired. The appeal is dismissed as moot. The district court properly denied Kamaaina Pumping, Incorporated's ("KPI") motion to enjoin EBI from future abuse of process. The motion arose from the employees' belated efforts to avoid their individual liability.

CONCLUSION

We hold that the district court properly recognized EBI's claim under Hawaii law for its employees' breach of their duty of loyalty by operating a competing business. The court also properly ordered the employees to disgorge their profits in appeal number

00-15474. The district court's order is AFFIRMED. In appeal number 01-17307, the appeal from the grant of EBI's TRO is DISMISSED AS MOOT. The district court's denial of KPI's motion to enjoin EBI is AFFIRMED.

Appendix B

***Findings of Fact and Conclusions of Law and Order* dated February 9, 2000 by J. Gillmore; *Riley et al. v. Eckard Brandes, Inc.*, (Civil No. 98-0779, USDC, D.Haw.)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RANDELL A. RILEY and LEE T. KUNIMITSU
Plaintiffs,

v.

ECKARD BRANDES, INC.,
Defendant.

and

All related claims.

Civil No. 98-0779 HG

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

The First Amended Complaint of Randell A. Riley and Lee T. Kunimitsu[1], filed on August 13, 1998,

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[1] Randell A. Riley and Lee T. Kunimitsu are the Plaintiffs and

and the Counterclaim of Eckard Brandes, Inc.[2], filed on September 30, 1998, came for trial before the Court on November 18, 1999. Randall Harakal and Junsuke Otsuka appeared on behalf of Riley and Kunimitsu. Ernest Nomura and Elena Onaga appeared on behalf of EBI. The Court, having considered the arguments of the parties, authority and evidence presented, issues the following findings of fact, conclusions of law, and order. Any finding of fact that should more properly be deemed a conclusion of law and any conclusion of law that should more properly be deemed a finding of fact shall be so construed.

FINDINGS OF FACT

1. This action arises out of an employment dispute between Randell A. Riley and Lee T. Kunimitsu, and their employer, Eckard Brandes, Inc.

2. During the period of January to June 1996 (the "relevant time period"), Riley and Kunimitsu were residents of the state of Hawaii.

3. During the relevant time period, EBI was a duly organized Hawaii corporation doing business in the state of Hawaii.

4. During the relevant time period, Riley and Kunimitsu were employees of EBI. (Defendant and

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Counterclaim Defendants in this action. Throughout this Order, they will be referred to as "Riley and Kunimitsu."

[2] Eckard B. ındes, Inc. is both the Defendant and Counterclaimant in this actiоn. In this Order, Eckard Brandes, Inc. will be referred to as "EBI."

Counterclaimant Eckard Brandes, Inc.'s Separate and Concise Statement of Facts, Re: Motion for Summary Judgment on Count II of the Counterclaim, ¶1.)

5. EBI is in the business of repairing, televising, and maintaining sewer pipes, culverts, drywells, and other structures that convey sewage, debris, or rainwater.

6. In 1996, Riley and Kunimitsu performed services for EBI on two public contract jobs - Pilot Project for Rehabilitation of Sewer Lines in Enchanted Lakes, Project No. C40966 ("Enchanted Lakes") and Kaneohe Wastewater Treatment Plant Sewer Line, Project No. C40966 ("WTTP"). (Declaration of Randell A. Riley, July 29, 1999, ¶6; Declaration of Lee T. Kunimitsu, July 29, 1999, ¶4 .)

7. From mid-January 1996 to June 12, 1996, EBI paid Riley $17,663.26 in net salary, excluding medical coverage and pension payments. (EBI's Exh. 157.)

8. From mid-January 1996 to June 19, 1996, EBI paid Kunimitsu $14,012.27 in net salary, excluding medical coverage and pension payments. (EBI's Exh. 158.)

9. On November 1, 1995, while still employed by EBI, Riley and Kunimitsu formed their own partnership, called Kamaaina Pumping, by executing a General Partnership Agreement. (Exh. C to Defendant and Counterclaimant Eckard Brandes, Inc.'s Separate and Concise Statement of Facts, Re: Motion for Summary Judgment on Count II of the Counterclaim; Declaration of Ernest H. Nomura,

June 14, 1999, ¶4.)

10. On January 12, 1996, the County of Hawaii published its Invitation for Bid No. 1606, Proposal and Specifications for A Price Agreement for Furnishing Drywell and Culvert Cleaning and Maintenance for the Department of Public Works (Bid No. 1606). (EBI's Exhibit 113.)

11. EBI submitted a bid to the County of Hawaii for the project. (Defendant and Counterclaimant Eckard Brandes, Inc.'s Concise Statement of Facts, Re: Motion for Summary Judgment on Count II of the Counterclaim, ¶5.)

12. On February 24, 1996, Riley and Kunimitsu, doing business as Kamaaina Pumping, submitted the only other bid for the project. (Proposal Price Agreement for Furnishing Drywell and Culvert Cleaning and Maintenance for the Department of Public Works, County of Hawaii, EBI's Exh. 114; Defendant and Counterclaimant Eckard Brandes, Inc.'s Concise Statement of Facts, Re: Motion for Summary Judgment on Count II of the Counterclaim, ¶5.)

13. Kamaaina Pumping was the lowest of the two bidders on Bid No. 1606. (EBI's Exh. 112.)

14. On March 27, 1996, Riley, as general partner of Kamaaina Pumping, executed the contract for Bid No. 1606 with the County of Hawaii. (EBI's Exh. 115.)

15. In 1996, Kamaaina Pumping received gross revenues from the County of Hawaii of $168,195 for services performed pursuant to the contract for Bid No.

1606. (EBI's Exh. 146.)

16. In 1997, Kamaaina Pumping received gross revenues from the County of Hawaii of $737,595 for services performed pursuant to the contract for Bid No. 1606. (Id.)

17. In 1996 and 1997, Riley and Kunimitsu received income from Kamaaina Pumping. The money Kamaaina Pumping paid to them during those years came from the funds Kamaaina Pumping earned from the County of Hawaii pursuant to the contract for Bid No. 1606.[3]

18. In 1996, Kunimitsu received ordinary income of $22,013 from Kamaaina Pumping. (EBI's Exh. 118.)

19. In 1996, Riley received ordinary income of $22,912 from Kamaaina Pumping. (Id.)

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[3] EBI has provided evidence of the amount the County of Hawaii paid to Kamaaina Pumping pursuant to the contract for Bid No. 1606. (EBI's Exh. 146.) EBI has also provided the income tax partnership return for Kamaaina Pumping for the years 1996 and 1997 (EBI's Exhs. 117, 118.) The income generated by Kamaaina Pumping in 1996 and 1997 (EBI's Exhs. 117, 118) does not match exactly the amount the County of Hawaii paid to Kamaaina Pumping in 1996 and 1997. (EBI's Exh. 146). Neither party has explained the minor discrepancy, however, or set forth evidence demonstrating that the money Kamaaina Pumping paid to Riley and Kunimitsu during 1996 and 1997 came from anything other than the amount Kamaaina Pumping earned from the County of Hawaii pursuant to the contract for Bid No. 1606. Given the evidence set forth by the parties, the Court finds that the amounts Kamaaina Pumping paid to Riley and Kunimitsu came from funds Kamaaina earned from the County of Hawaii.

20. In 1997, Kunimitsu received ordinary income of $217,690 from Kamaaina Pumping. (EBI's Exh. 117.)

21. In 1997, Riley received ordinary income of $226,577 from Kamaaina Pumping. (EBI's Exhs. 117, 121.)

22. On August 13, 1998, Riley and Kunimitsu filed an Amended Complaint in the Circuit Court of the First Circuit, State of Hawaii, alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 207 ("FLSA"), and Hawaii Revised Statutes §§ 387-3 and 387-12(c).

23. On September 23, 1998, EBI removed the case to this Court alleging federal question jurisdiction.

24. On September 30, 1999, EBI filed its Answer to Riley and Kunimitsu's Amended Complaint, as well as a Counterclaim. In the Counterclaim, EBI alleged a number of causes of action, including that Riley and Kunimitsu breached their fiduciary duty of loyalty by competing with EBI to win Bid No. 1606 while still working for EBI.

25. On June 14, 1999, EBI filed a Motion for Summary Judgment on the Amended Complaint.

26. On June 14, 1999, EBI filed a Motion for Summary Judgment on Count II of the Counterclaim - Breach of the Fiduciary Duty of Loyalty.

27. In the Court's October 22, 1999 Order, the Court granted in part and denied in part EBI's Motion for Summary Judgment on the Amended Complaint. The Court determined that the only wage compensation

issue remaining for trial was whether EBI owed to Riley and Kunimitsu overtime compensation for the Enchanted Lakes and WWTP projects. (Order Granting Defendant and Counterclaimant Eckard Brandes, Inc.'s Motion for Summary Judgment, dated October 22, 1999, at 54.)

28. In the October 22, 1999 Order, the Court also granted EBI's Motion for Summary Judgment on Count II of the Counterclaim. The Court determined that Riley and Kunimitsu had not met their burden to establish a genuine issue of material fact with respect to the duty of loyalty issue and that Riley and Kunimitsu had breached their duty of loyalty to EBI. The Court further determined that the only remaining question with respect to the duty of loyalty issue was how to ascertain the damages EBI suffered due to Plaintiff's breach. (Id. at 54-55.)

29. On November 16, 1999, the parties entered into a Stipulation to Dismiss Remaining Overtime Claims Asserted by Plaintiff Lee T. Kunimitsu against Defendant Eckard Brandes, Inc.

30. At a hearing held on November 18, 1999, counsel for EBI and counsel for Riley and Kunimitsu stipulated that the value of Riley's overtime compensation claim for the Enchanted Lakes Project and WWTP projects is $3,735.76.

CONCLUSIONS OF LAW

1. Jurisdiction. The Court's original jurisdiction over Riley and Kunimitsu's Amended Complaint is pursuant to 28 U.S.C. § 1331.

2. In its Order dated October 22, 1999, the Court granted EBI's Motion for Summary Judgment on the Amended Complaint as to the only federal law issue raised in the case - Riley and Kunimitsu's overtime compensation claim under the Fair Labor Standards Act. After the Court filed its Order, only state law claims remained.

3. The Court retains supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3). A court should consider the factors of judicial economy, convenience, fairness, and comity when deciding whether to retain supplemental jurisdiction. See Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992). Here, at the time the Court dismissed Riley and Kunimitsu's federal claims, the parties had completed discovery, and the trial date was less than three weeks away. As a result, the judicial economy, convenience and fairness factors militate in favor of exercising supplemental jurisdiction over the remaining state law claims.

4. Riley and Kunimitsu Overtime Compensation Claims Under Hawaii Revised Statutes Chapter 104. Hawaii Revised Statutes Chapter 104 governs Riley's claim for overtime compensation relating to the Enchanted Lakes and WWTP projects. Pursuant to Hawaii Revised Statutes § 104-28(a), Riley is entitled to only the unpaid overtime compensation for the Enchanted Lakes and WWTP projects. As stipulated to by the parties on the record, the amount of overtime that EBI owes to Riley for the two projects at issue is $3,735.76.

5. Riley and Kunimitsu, however, breached their fiduciary duty of loyalty to EBI as a matter of law. (Order at 51-52.) Riley and Kunimitsu are not entitled to any compensation during the period of disloyalty. See, e.g., Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc., 474 N.Y.S. 2d 281, 286, 287 (N.Y. App. Div. Ct. 1984); Wilshire Oil Co. of Texas v. Riffe, 406 F.2d 1061, 1062 (10th Cir. 1969); Cameco, Inc. v. Gedicke, 724 A.2d 783, 790 (N.J. 1999); Jet Courier Service, Inc. v. Mulei, 771 P.2d 486, 499-500 (Colo. 1989); Restatement (Second) of Agency § 469 (1958).

6. Riley's work on both the Enchanted Lakes and WWTP projects was performed during the period in which he was disloyal to EBI. This period was from mid-January 1997 to June 17, 1996.[4] Riley is therefore not entitled to any overtime compensation for his work on the Enchanted Lakes or WWTP projects. See, e.g., Maritime Fish Products, Inc., 474 N.Y.S. 2d at 286, 287; Wilshire Oil Co. of Texas, 406 F.2d at 1062; Cameco, 724 A.2d at 790; Jet Courier Service, Inc., 771 P.2d at 499-500; Restatement (Second) of Agency § 469 (1958).

7. EBI is entitled to the return of any compensation paid to Riley and Kunimitsu during the period of disloyalty. See, e.g., Maritime Fish Products, Inc., 474 N.Y.S. 2d at 287; Wilshire Oil Company of

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[4] The parties both agree that the period of disloyalty was from mid-January to June 17, 1996. (Riley and Kunimitsu's First Amended Proposed Findings of Fact and Conclusions of Law at 7; Defendant and Counterclaimant Eckard Brandes, Inc.'s Amended Proposed Findings of Fact and Conclusions of Law at 3.) On January 12, 1996, the County of Hawaii published its Invitation for Bid No. 1606. (EBI's Exh. 113.) On June 17, 1996, EBI terminated the employment of both Riley and Kunimitsu.

Texas, 406 F.2d at 1062; Jet Courier Service, Inc., 771 P.2d at 499-500; Cameco, Inc. 724 A.2d at 790; ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc., 90 Ill. App. 3d 817 (1980); American Timber & Tradinq Co. v. Niedermeyer, 276 Or. 1135 (1976); Restatement (Second) of Agency § 469.

8. EBI is therefore entitled to repayment of the compensation it paid to Riley during the period of his disloyalty. See, e.g., Maritime Fish Products, Inc., 474 N.Y.S. 2d at 287; Wilshire Oil Company of Texas, 406 F.2d at 1062; Jet Courier Service, Inc., 771 P.2d at 499-500; Cameco, Inc. 724 A.2d at 790; ABC Trans National Transport, Inc., 90 Ill. App. 3d 817; American Timber & Trading Co., 276 Or. 1135; Restatement (Second) of Agency § 469. Riley must therefore repay to EBI $17,663.26 - the amount EBI paid to him from mid-January 1996 through June 17, 1996.

9. Similarly, EBI is entitled to repayment of the compensation it paid to Kunimitsu during the period of disloyalty. See, e.g., Maritime Fish Products, Inc., 474 N.Y.S.2d at 287; Wilshire Oil Company of Texas, 406 F.2d at 1062; Jet Courier Service, Inc., 771 P.2d at 499-500; Cameco, Inc. 724 A.2d at 790; ABC Trans National Transport, Inc., 90 Ill. App. 3d 817; American Timber & Trading Co., 276 Or. 1135; Restatement (Second) of Agency § 469. Kunimitsu must therefore repay to EBI $14,012.27 - the amount EBI paid to him from mid-January 1996 through June 17, 1996.

10. Damages for Riley and Kunimitsu's Breach of Fiduciary Duty of Loyalty. When an employee breaches his fiduciary duty of loyalty owed to an employer, the employer has a choice of remedies, one of

which is the equitable remedy of restitution. See, Western Electric Co. v. Brenner, 41 N.Y.2d 291, 295 (N.Y. 1977); Demoulas v. Demoulas Super Markets, Inc., 677 N.E.2d 159, 195 (Mass. 1997); Restatement (Second) Agency § 399 (1958). See also Tory A. Weigand, Employee Duty of Loyalty and the Doctrine of Forfeiture, 42 Boston B.J. 6, 20, September/October 1998 (summarizing remedial options employer may. choose in a breach of fiduciary duty of loyalty action); E. Allan Farnsworth, Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract, 94 Yale L.J. 1339, 1354 (1985) (explaining that employer may choose equitable remedy of disgorgement even basis of action is contractual).

11. EBI prayed for equitable relief in its Counterclaim. (Counterclaim, September 30, 1999, at 5.) Specifically, EBI's Counterclaim prayed:

That a constructive trust [be] imposed against Counterclaim Defendants in the amount to which they were unjustly enriched; and

That [EBI be] awarded such other and further relief as the Court deems just and equitable.

(Id.)

12. On November 8, 1999, at a hearing before Magistrate Judge Yamashita, EBI made clear that it sought the equitable remedy of restitution. Specifically, EBI requested the disgorgement of all gains received by Riley and Kunimitsu. (Riley and Kunimitsu's Trial Brief on Disgorgement at 2.)

13. Disgorgement is an appropriate means by which to achieve restitution when an employee breaches his fiduciary duty of loyalty owed to his employer. See, e.g., Demoulas, 677 N.E.2d at 195; Chernow v. Reyes, 570 A.2d 1282, 1285 (N.J. 1990).

14. The purpose of the equitable remedy of disgorgement to prevent the unjust enrichment of the wrongdoer. See, e.g., Fidelity Manaqement & Research Co. v. Ostrander, 662 N.E.2d 699, 705 (Mass. 1996) (stating that the overall object of disgorgement is to render the ultimate recovery a sound reflection of the wrongdoer's unjust enrichment due to the beach of the fiduciary duty).

15. The Court determines that the most equitable reflection of the amount by which Riley and Kunimitsu were unjustly enriched is not the entire amount received by Kamaaina Pumping for the contract for Bid No. 1606 - $905,790. This amount would provide a windfall to EBI and would ignore the costs and expenses of performing the work for the project such as the value of the labor provided to Kamaaina pumping, the purchase of equipment other normal costs of doing business. See Burg v. Miniature Precision Components, Inc., 330 N.W.2d 192, 199 (Wis. 1983) (adopting trial court's finding that an award of gross receipts is improper because it is unfair to the agent and provides a windfall to the principal).

16. The Court determines that the most accurate and equitable reflection of the amount by which Riley and Kunimitsu were unjustly enriched is the funds Kamaaina paid to Riley and Kunimitsu minus the value of their labor provided to Kamaaina during 1996 and

1997. See Hill v. Names & Addresses, Inc., 571 N.E.2d 1085, 1096 (Ill. App. 1991) (recognizing that the amount of money disgorged should accurately reflect the seriousness of the wrongdoing). Riley must therefore disgorge to EBI $164,177. Kunimitsu must disgorge to EBI $155,290. These figures are the most reasonable amounts to be awarded as a mere award of the funds paid to them would fail to take into account the fact that Kamaaina Pumping incurred the normal business expense of paying workers (Riley and Kunimitsu) for the labor necessary to perform work on the contract for Bid No. 1606. The specific amounts are calculated as follows:

a. Riley - 1996. In 1996, Kamaaina Pumping paid to Riley $22,912. For the six months Riley worked for Kamaaina Pumping in 1996, the Court determines that the value of his labor was $31,200.[5] Because the value of Riley's labor during the latter six months of 1996 exceeds the amount he was paid during that period, neither Kamaaina Pumping nor Riley need to disgorge any money to EBI for this period.

b. Kunimitsu - 1996. In 1996, Kamaaina Pumping paid to Kunimitsu $22,013. For the six months Kunimitsu worked for Kamaaina Pumping in 1996, the Court determines that the value of his labor was also $31,200.[6] Because the value of Riley's labor during the

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[5] The Court derives the value of labor figure as follows. During 1995, Riley earned a salary of $1,200 per week. (EBI's Exh. 127.) Such a figure is the most accurate reflection of the value of Riley's labor that has been presented to the Court. $1,200 per week multiplied by 26 weeks equals $31,200.

[6] The Court determines that the value of Kunimitsu's labor is equivalent to that of Riley because Riley and Kunimitsu acted as

latter six months of 1996 exceeds the amount he was paid during that period, neither Kamaaina Pumping nor Kunimitsu need to disgorge any money to EBI for this period.

c. Riley - 1997. In 1997, Kamaaina Pumping paid to Riley $226,577. For 1997, the value of Riley's labor was $62,400.[7] Subtracting the value of labor - $62,400 - from Riley's income of $226,577, the Court derives $164,177. Riley must disgorge this amount to EBI.

d. Kunimitsu - 1997. In 1997, Kamaaina Pumping paid to Kunimitsu $217,690. For 1997, the value of Kunimitsu's labor was $62,400. Subtracting the value of labor - $62,400 - from Kunimitsu's income of $217,690, the Court derives $155,290. Kunimitsu must disgorge this amount to EBI.

17. Riley, accordingly, must disgorge to EBI $164,177. The total amount Riley must pay to EBI is $181,840.26.

18. Kunimitsu, accordingly, must disgorge to EBI $155,290. The total amount Kunimitsu must pay to EBI is $169,302.27.

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equal partners in their venture. This fact is reflected by the 1996 and 1997 partnership tax returns for Kamaaina Pumping, which demonstrate that Riley and Kunimitsu were paid nearly equivalent funds. (EBI's Exhs. 117, 118.)

[7] This figure is derived by multiplying $1200 by 52 weeks.

ORDER

Based on the authority and evidence reviewed, and the Findings of Fact and the Conclusions of Law stated herein, it is hereby ORDERED, ADJUDGED AND DECREED:

1. EBI is entitled to repayment of the compensation it paid to Riley during the period of his disloyalty. The amount Riley must repay to EBI is $17,663.26.

2. EBI is entitled to repayment of the compensation it paid to Kunimitsu during the period of disloyalty. The amount Kunimitsu must repay to EBI is $14,012.27.

3. EBI is entitled to the equitable remedy of restitution for Riley and Kunimitsu's breach of the fiduciary duty of loyalty owed to EBI.

4. The salary paid by Kamaaina Pumping to Riley and Kunimitsu in 1996 and 1997 minus the value of their labor during the latter one-half of 1996 and during 1997, is the most equitable reflection of the amount by which Riley and Kunimitsu were unjustly enriched.

5. Riley must disgorge to EBI a total of $164,177.

6. Kunimitsu must disgorge to EBI a total of $155,290.

7. Riley must pay a total of $181,840.26 to EBI.

8. Kunimitsu must pay a total of $169,302.27 to EBI.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, 2-9-00.

s/ Helen Gillmore
HELEN GILLMOR
United States District Judge

Riley v. Eckard Brandes, Inc., Findings of Fact and Conclusions of Law and Order; Civil No. 98-00779 HG.

Appendix C

ORDER GRANTING DEFENDANT AND COUNTERCLAIMANT ECKARD BRANDES, INC.'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDED COMPLAINT; ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS/COUNTERCLAIM DEFENDANTS RANDELL A. RILEY, LEE T.KUNIMITSU AND KAMAAINA PUMPING'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTERCLAIMS FOR COUNT 1 - BREACH OF CONTRACT, COUNT II - BREACH OF DUTY OF EMPLOYEE LOYALTY AND COUNT III - MIS-APPROPRIATION OF TRADE SECRETS; ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNTII OF THE COUNTERCLAIM; ORDER DENYING PLAINTIFFS/-COUNTERCLAIM DEFENDANTS RANDELL A. RILEY, LEE T. KUNIMITSU AND KAMAAINA PUMPING'S MOTION FOR CERTIFICATION OF QUESTION OF STATE LAW TO THE HAWAII SUPREME COURT AND STAY PENDING STATE COURT'S DECISION **dated November 18, 1999 All by J. Gillmore; *Riley et al. v. Eckard Brandes, Inc.*, (Civil No. 98-0779, USDC, D.Haw.)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RANDELL A. RILEY and LEE T. KUNIMITSU
Plaintiffs,

v.

ECKARD BRANDES, INC.,
Defendant.

and

All related claims.

Civil No. 98-0779 HG

ORDER GRANTING DEFENDANT AND COUNTERCLAIMANT ECKARD BRANDES, INC.'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDED COMPLAINT

and

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS/COUNTERCLAIM DEFENDANTS RANDELL A. RILEY, LEE T. KUNIMITSU AND KAMAAINA PUMPING'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTERCLAIMS FOR COUNT 1 - BREACH OF CONTRACT, COUNT II - BREACH OF DUTY OF EMPLOYEE LOYALTY AND COUNT III - MISAPPROPRIATION OF TRADE SECRETS

and

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT II OF

THE COUNTERCLAIM

and

ORDER DENYING PLAINTIFFS/-COUNTERCLAIM DEFENDANTS RANDELL A. RILEY, LEE T. KUNIMITSU AND KAMAAINA PUMPING'S MOTION FOR CERTIFICATION OF QUESTION OF STATE LAW TO THE HAWAII SUPREME COURT AND STAY PENDING STATE COURT'S DECISION

Plaintiffs Randell A. Riley and Lee T. Kunimitsu ("Plaintiffs"), former employees of Defendant Eckard Brandes, Inc. ("Defendant") bring this action in an Amended Complaint to recover unpaid overtime compensation, liquidated damages, attorneys' fees, and costs under the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b), and the Hawaii Wage and Hour Act, Section 387-12(c) of the Hawaii Revised Statutes. Defendant moves for summary judgment on the Amended Complaint, has filed a Counterclaim raising five state law claims, and moves for summary judgment on Count II of the Counterclaim. Plaintiffs have moved for summary judgment as to Counts I, II, and III of the Counterclaim.

PROCEDURAL HISTORY

On August 13, 1998, Plaintiffs filed an Amended Complaint against Defendant in the Circuit Court of the First Circuit, State of Hawaii, alleging violations of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b), and the Hawaii Wage and Hour Act, Section 387-12(c) of the Hawaii Revised Statutes. On

September 23, 1998, Defendant removed the case to this Court on grounds of federal question jurisdiction.

Defendant filed an Answer to the Amended Complaint, and a Counterclaim on September 30, 1998. In the Counterclaim, Defendant raises the following five claims, pursuant to Hawaii State law: (1) Breach of contract, (2) Breach of fiduciary duty of loyalty, (3) Misappropriation of trade secrets, (4) Interference with business expectancy, and (5) Punitive damages and attorneys' fees.

Defendant filed a Motion for Summary Judgment on Count II of the Counterclaim - Breach of fiduciary duty of loyalty - on June 14, 1999. Plaintiffs filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment on July 29, 1999 and an Errata to their memorandum on July 30, 1999. On August 6, 1999, Defendant filed a Reply to Plaintiffs' Memorandum in Opposition.

Defendant also filed a Motion for Summary Judgment on the Amended Complaint on June 14, 1999. Plaintiffs filed a Memorandum in opposition to Defendant's Motion on July 29, 1999, and Defendant filed a Reply to Plaintiffs' Memorandum in Opposition on August 6, 1999.

On June 14, 1999, Plaintiffs filed a Motion for Partial Summary Judgment as to Defendant's Counterclaims for: Count I - Breach of Contract, Count II - Breach of duty of employee loyalty, and Count III - Misappropriation of trade secrets. Defendant filed a Memorandum in opposition to Plaintiffs' Motion on July 29, 1999. Plaintiffs filed a Reply to Defendant's

Memorandum in Opposition on August 6, 1999.

The three motions came for hearing before the Court on August 18, 1999.

Plaintiffs filed a Notice of Plaintiffs/Counterclaim Defendants Randell A. Riley Lee T. Kunimitsu and Kamaaina Pumping's Motion for Certification of Question of State Law to the Hawaii Supreme Court and Stay Pending State Court's Decision, on October 18, 1999.

After careful consideration of the evidence, the parties' arguments, and the governing law, the Court rules as follows: The Court GRANTS IN PART and DENIES IN PART Defendant's Motion for Summary Judgment on the Amended Complaint; the Court GRANTS IN PART and DENIES IN PART Plaintiffs' Motion for Partial Summary Judgment as to Counterclaims for Count I, Count II, and Count III and DISMISSES all counterclaims as to Kamaaina Pumping; and the Court GRANTS Defendant's Motion for Summary Judgment on Count II of the Counterclaim.

STATEMENT OF FACTS

Plaintiffs Randell A. Riley and Lee T. Kunimitsu ("Plaintiffs") are former employees of Defendant Eckard Brandes, Inc. ("Defendant"). Defendant is involved in the business of plumbing. As part of that business, Defendant performs the maintenance and cleaning of drywells and culverts in the state of Hawaii. Defendant terminated both Kunimitsu and Riley on June 17, 1996.

Defendant allegedly terminated Plaintiffs due to the fact that Plaintiffs competed against Defendant, while still working for Defendant. Specifically, while employed by Defendant, Riley and Kunimitsu formed a general partnership called Kamaaina Plumbing, Inc. ("Kamaaina"). After forming Kamaaina, Plaintiffs, through Kamaaina, submitted a price proposal to furnish drywell and culvert cleaning and maintenance services for the Department of Public Works, County of Hawaii, Bid No. 1606 ("Bid No. 1606"). Defendant was the only other company to bid on Bid No. 1606. Kamaaina Pumping was the lowest of the two bidders, and accordingly, was awarded the contract. In March, 1996, Kamaaina entered into a contract with the County of Hawaii to furnish drywell and culvert cleaning and maintenance for Bid No. 1606.

Defendant alleges that Plaintiffs could not have secured the contract for Bid No. 1606 without having misappropriated certain information from Defendant, such as Defendant's technological know-how regarding the cleaning of drywells and Defendant's cost and pricing information for such cleaning projects. Defendant terminated Plaintiffs after Defendant learned of Plaintiffs' actions surrounding the formation of Kamaaina Plaintiffs' bid on Bid. No. 1606. Defendant's Counterclaim arises out of this allegedly inappropriate competition against Defendant for Bid No. 1606.

After Plaintiffs were terminated by Defendant, they filed the instant action, alleging that Defendant had failed to pay them for overtime hours they had put in while working on various projects for Defendant throughout the state of Hawaii. In particular, Plaintiffs

allege that Defendant failed to pay Plaintiffs for public contract projects on which Plaintiffs had worked during the years 1995 and 1996. Defendant contends, in its various motions, that Defendant has properly paid Plaintiffs for all overtime hours Plaintiffs worked while employed by Defendant.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of "identifying for the court the portions of the materials on file [in the case] that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. See T.W. Elec. Serv., 809 F.2d at 630; Fed. R. Civ. P. 56(e). In a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. State, Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989).

ANALYSIS

Defendant's Motion for Summary Judgment on the Amended Complaint

Defendant urges the Court to grant summary judgment with respect to both Plaintiffs' federal and state claims for overtime compensation. The Court addresses each claim in turn.

I. Plaintiffs' Claims under the Fair Labor Standards Act

Defendant contends that Plaintiffs' claims for 'overtime compensation under the Fair Labor Standards Act ("FLSA") are barred by the statute of limitations. The Court agrees.

Section 255(a) of the FLSA, 29 U.S.C. §§ 216, 251-262, provides a limitations period of two years to file an unpaid overtime compensation claim under the FLSA, unless a willful violation can be established and proven. Section 255(a) provides, in relevant part, as follows:

Any action commenced on or after May 14, 1947, to enforce any cause of action for . . . unpaid overtime . . under the Fair Labor Standards Act. . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . .

29 U.S.C. § 255(a). A party commits "willful" conduct by acting "willfully" or in "reckless disregard" that its conduct was prohibited by the FLSA. See McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133-135 (1988) (to obtain the benefit of the 3-year exception, the claimant must prove that the employer's conduct was willful); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985) (willful violation is not committed unless claimant can prove that employer knew or showed reckless disregard that its conduct was prohibited by the FLSA); Service, Employees Int'l Union v. County of San Diego, 60 F.3d 1346, 1355 (9th Cir. 1994) (same); Mireles v. Frio Foods, 899 F.2d 1407, 1416 (5th Cir. 1990) (negligent violation of the statute does not constitute willfulness and accordingly will not extend statute).

The party that seeks to extend the statute of limitations must prove the willful conduct because, as the McLaughlin court noted, Congress made a "significant distinction" between an "ordinary violation" and a "willful violation" in enacting the 3-year limitations period. The McLaughlin court stated,

The fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations.

McLaughin, 486 U.S. at 132. Due to this significant distinction, an employer's negligent conduct or incorrect assumption that a pay plan complies with the FLSA does not constitute a willful violation. Id. at 135; Trans World Airlines, 469 U.S. at 128. Similarly, a mere

assertion that an employer knew that the FLSA was applicable to its departments is not sufficient to establish a knowing or reckless violation. See Armitage v. City of Emporia, 782 F. Supp. 537, 545 (D. Kan. 1992), rev'd on other grounds, 982 F.2d 430 (10th Cir. 1992)(3-year period did not apply because plaintiffs failed to produce evidence showing that defendant knew that its flex time plan or standby plan violated the FLSA).

Here, the parties do not dispute that Plaintiffs filed their Complaint in this action beyond the 2-year limitations period, but before the 3-year period had run. (Defendant's Motion for Summary Judgment on the Amended Complaint. at 7; Plaintiffs' Memorandum in Opposition to Eckard Brandes, Inc's Motion for Summary Judgment on the Amended Complaint as to Unpaid Overtime Wages and Hours (Mem. In Opp. to Def.'s Summ. Judg.) at 6.) Plaintiffs contend that the 3-year statute of limitations should apply because Defendant willfully violated the FLSA. Specifically, Plaintiffs argue that Defendant failed to provide to Plaintiffs or post at Plaintiffs' job sites, calculations of the prevailing wage rates for the jobs on which Plaintiffs were working.[1] The Court finds that Plaintiffs have failed to meet their burden of proving willfulness. See, e.g., Service Employees Int'l Union, 60 F.3d at 1355 (conclusory allegation does not constitute evidence of a willful violation of FLSA); EEOC v. O'Grady, 857 F.2d 383, 388 (7th Cir. 1988) (plaintiffs must make a sufficient showing of a reckless or

[1] Hawaii Revised Statutes § 104-2(d)(2), requires that in all public works contracts the employer shall post at the job site the prevailing wage rate and shall provide to each laborer employed a copy of the rate of wages. The FLSA requires no such posting.

knowing violation).

Plaintiffs have not produced sufficient evidence to demonstrate Defendant knew or showed a reckless disregard that its conduct was prohibited by the FLSA. The fact that Defendant may not have properly posted prevailing wage rate information may, as Plaintiffs allege, have handicapped Plaintiffs in their efforts to determine whether they had been paid the correct amount of overtime wages. The failure also may have violated Hawaii law.[2] Such a failure, however, in no way demonstrates, as a matter of law, that Defendant willingly violated the FLSA. See id.; see also Armitage, 782 F. Supp. at 545 (plaintiff failed to establish willful violation because plaintiff failed to establish that defendant knew that it was violating the FLSA). Without more, such a failure to post is consistent with a careless oversight. Plaintiffs have cited no legal authority to support their argument that a failure to post prevailing wage information constitutes a willful violation of the FLSA.

Because Plaintiffs have failed to present evidence or legal authority demonstrating that Defendant acted in a willful or reckless manner, the 3-year FLSA statute of limitations does not apply. The Court therefore GRANTS Defendant's Motion for Summary Judgment on the Amended Complaint as to Plaintiffs' overtime compensation claims under the FLSA.

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[2] To be clear, the Court is not deciding this issue at this time.

II. Plaintiffs' Claims under Hawaii State Law

A. Overtime Compensation of Randell Riley

Plaintiffs' Amended Complaint alleges that Defendant owes Plaintiffs overtime compensation back pay pursuant to Hawaii Revised Statutes § 387-12(c) for work performed by Plaintiffs during the time period from January, 1990 through July 1996. Defendant has argued that Riley is not entitled to recover under § 387-12(c) because he was a salaried employee during the relevant period, and earned approximately $5,000 per month. See H.R.S. § 387-1 (exempting from the definition of employee one who earns more than $1,250 per week). Plaintiffs have conceded this issue in their Memorandum in Opposition. (Memo. In Opp. to Def.'s Summ. Judg. at 2.) Plaintiffs similarly conceded this issue in the summary judgment hearing held on August 18, 1999. The Court therefore determines that Riley may not recover under H.R.S. § 387-12(c).

In Plaintiffs' Memorandum in Opposition, Plaintiffs argue that even if Riley may not recover under H.R.S. § 387-12(c), he may still recover pursuant to H.R.S. Chapter 104 ("Chapter 104"). This Chapter governs employee wages on public works projects, and does not contain the § 387-1 salaried employee exemption. Although Plaintiffs did not allege a violation of Chapter 104 in Plaintiffs' Amended Complaint, the Court will consider the argument due to the fact that the Federal Rules of Civil Procedure establish a liberal system of notice pleading. See American Timber & Trading v. First Nat'l Bank, 690 F.2d 781, 786 (9th Cir. 1982)("A party need not plead specific legal theories in the complaint, so long as the other side receives notice

as to what is at issue in the case.").

Plaintiffs argue that Riley was not reimbursed for public works projects he worked on during the years 1993 through 1996 (Mem. in Opp. to Def.'s Mtn. for Summ. Judg. at 2.) Riley, in his declaration, does not specify what public works projects Riley allegedly worked on without being properly compensated. In his declaration, Riley states only that, "I was working on a State of Hawaii, City and County of Honolulu job and I was doing laborers work and I believe I should have been paid the prevailing wage rate . . ." (Declaration of Randell A. Riley, July 29, 1999, ¶6.) Such a general statement, which is inconclusive and lacks particularity, fails to alert the Court to what projects Riley is putting at issue.

The Court notes, however, that Riley states that he performed the same type of work that Kunimitsu performed during 1996. (Id.) Kunimitsu, according to his declaration, performed public contract work on two jobs during 1996 - the Kailua Enchanted Lakes Pilot Project ("Enchanted Lakes") and the Kaneohe Wastewater Treatment Plant Project ("WWTP"). (Declaration of Lee T. Kunimitsu, July 29, 1999, q 4.) Adding the statements from these two declarations together, it appears that Riley is putting at issue two contracts - Enchanted Lakes and WWTP. The Court, accordingly, will consider evidence with respect to these two projects. The Court will not consider evidence with respect to any other projects, which Riley attempts to put at issue by way of vague, general statements. See Fed. R. Civ. P. 56(e)(if moving party satisfies initial burden, the opposing party may not rely on denials in the pleadings, but must produce specific

evidence, through affidavits or admissible discovery material, to show that a dispute exists); see also Lulan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (a non-movant "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); T.W. Elec. Serv., 809 F.2d at 630 (party opposing summary judgment cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial).

With regard to the two projects put at issue, Defendant has not set forth evidence to show that Riley was properly compensated for back overtime pay and, accordingly, has failed to carry its burden to demonstrate the absence of a genuine issue of material fact on this issue. The Court therefore DENIES Defendant's Motion for Summary Judgment on the Amended Complaint as to Riley's claims for overtime compensation for the Enchanted Lakes and WWTP projects. The Court GRANTS Defendant's Motion with respect to all other projects.

B. Overtime Compensation of Lee T. Kunimitsu

Plaintiffs limit their overtime compensation claim for Kunimitsu to a Chapter 104 claim for two public works projects on which Kunimitsu worked. (Mem. in Opp. to Def.'s Summ. Judg. at 3.) Specifically, Plaintiffs contend that Kunimitsu was not properly compensated for his overtime for the Enchanted Lakes and WWTP projects. (Id.; Declaration of Lee T. Kunimitsu, July 29, 1999, ¶4.) Defendant has not carried its burden to demonstrate the absence of a genuine issue of material fact with respect to Kunimitsu's back pay for these two projects.

Defendant has established that the Department of Labor and Industrial Relations ("DLIR") conducted an audit and investigation regarding Defendant's compliance with Chapter 104 with respect to each of these projects. Specifically, the DLIR investigated Defendant's compliance with Chapter 104 for the years 1993 to 1996. (Exh. B to Defendant's Reply Memorandum in Support of Defendant's Motion for Summary Judgment on the Amended Complaint (Def.'s Reply in Supp. of Mtn. for Summ. Judg.)) The investigation included four projects: Enchanted Lakes; the Honouliuli Tributary Area Sewer Line Rehabilitation in Wahiawa Whitmore; WWTP; and the Wailuku Paia Sewer Line Rehabilitation. (Id.)

Upon completion of its investigation the DLIR determined that Defendant had not fully complied with Chapter 104 requirements but that Defendant's oversight was unintentional. (Id.) Based on the DLIR's investigation and determination, Defendant and the DLIR entered into a settlement agreement. Under the terms of the settlement agreement, Defendant agreed to pay a total amount of $19,607.73 in order to compensate employees for all unpaid overtime on the four investigated projects. (Exh. E to Defendant's Separate and Concise Statement of Facts Re: Motion for Summary Judgment on the Amended Complaint (Def.'s Stmt. Facts Re: Summ. Judg.) at 3.) Pursuant to the settlement agreement, Defendant paid to Kunimitsu back wages for overtime for each of the four audited projects. (Defendant's Separate and Concise Statement of Facts re: Motion for Summary Judgment on the Amended Complaint (Def.'s Stmt. Facts Re: Summ. Judg.) ¶19; Plaintiffs' Separate and Concise Statement of Facts Accepting the Facts in Defendant's

Concise Statement in Support of its Motion for Summary Judgment on the Amended Complaint, at 2.) In particular, on June, 4, 1997, Defendant sent a check for $1,080.34 to Kunimitsu for all back overtime wages owed. (Exh. D to Def.'s Reply in Supp. of Mtn. Summ. Judg.)

Although Defendant has shown the existence of the settlement agreement between DLIR and Defendant, Defendant has not demonstrated that Kunimitsu accepted the terms of the agreement. Kunimitsu has stated that he was not a party to the agreement and that he never accepted the terms of the agreement. (Declaration of Lee T. Kunimitsu, July 29, 1999, ¶5.) Defendant has not shown otherwise.

In addition, Defendant has failed to present evidence to demonstrate that the settlement agreement properly compensated Kunimitsu for all back overtime compensation for the Enchanted Lakes and WWTP projects. Plaintiffs allege that Defendant still owed Kunimitsu back overtime compensation pay even after Kunimitsu received payment pursuant to the settlement agreement. (Plaintiffs' Mem. in Opp. to Def.'s Mtn. for Summ. Judg. at 3-4; Declaration of Lee T. Kunimitsu, July 29, 1999, ¶5-7.) Defendant's only response to Plaintiffs' allegation is a general statement that Kunimitsu was fully reimbursed pursuant to the settlement agreement. (Def.'s Reply Mem. in Supp. of Mtn. for Summ. Judg. at 7.) Such a broad statement, without more, is insufficient to establish that Kunimitsu was fully reimbursed for back overtime pay for the Enchanted Lakes and WWTP projects. Defendant has failed to meet its burden to establish the absence of a genuine issue of material fact with respect to the two

projects Kunimitsu has put at issue. The Court, accordingly, DENIES Defendant's Motion for Summary Judgment on the Amended Complaint as to Kunimitsu's claims for overtime compensation under Hawaii state law.

Plaintiffs' Motion for Partial Summary Judgment as to Counterclaims for Count I - Breach of Contract, Count II - Breach of Duty of Loyalty, and Count III – Misappropriation of Trade Secrets

Plaintiffs have filed a Motion for Partial Summary Judgment as to Count I, Count II, and Count III of Defendant's Counterclaim. The Court will address Plaintiffs' arguments with respect to each Count in turn.

I. Defendant Kamaaina Pumping

Defendant's Counterclaim names three counterclaim defendants - Randell A. Riley, Lee T. Kunimitsu, and Kamaaina Pumping, a Hawaii general partnership. Plaintiffs have requested that the Court dismiss the Counterclaim as to Kamaaina Pumping because Kamaaina Pumping was never employed by Defendant and therefore cannot be liable for any of the causes of action set forth in the Counterclaim. Defendant does not respond to Plaintiffs' argument regarding Kamaaina Pumping.

Defendant's Counterclaim states five causes of action, as follows: Breach of Contract, Breach of Fiduciary Duty of Loyalty, Misappropriation of Trade Secrets, Interference with Business Expectancy, and Punitive Damages and Attorneys' Fees. Each of these

causes of action arises out of the individual plaintiffs' - Riley and Kunimitsu's - employment with Defendant. Specifically, Defendant is basing its action on the alleged fact that Riley and Kunimitsu used confidential information learned while employed by Defendant in order to successfully bid against Defendant on Bid No. 1606. Defendant has not alleged activity with respect to Kamaaina Pumping sufficient to state a claim for any-of the five causes of action asserted in Defendant's counterclaim. See Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998) (bare, generalized claims with no factual support are insufficient to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)).

In particular, Defendant does not allege that Kamaaina Pumping, a Hawaii general partnership, was ever affiliated with or interacted with Defendant. Without such interaction, Kamaaina Pumping could not have beached an employment contract with Defendant or owed a duty of loyalty. Defendant has not shown otherwise. Defendant, likewise, has not demonstrated how Kamaaina Pumping could have misappropriated Defendant's trade secrets or interfered with business expectancy without having had any interaction with Defendant. Due to Defendant's failure to set forth any facts regarding Kamaaina Pumping, Defendant has failed to state a claim with respect to that counterdefendant. See id. The Court, accordingly, DISMISSES all counterclaims as to Kamaaina Pumping.

II. Breach of Contract

Plaintiffs set forth a number of arguments in support of their summary judgment motion as to

Defendant's Breach of Contract claim. The Court has sorted out these arguments as follows. First, Plaintiffs take issue with the contractual formalities surrounding the Confidentiality Agreement at issue. Specifically, Plaintiffs argue that Defendant failed to execute each agreement and that each agreement lacks consideration. Second, Plaintiffs contend that the Confidentiality Agreement was limited in scope to one specific "pipelining" process and that it therefore did not cover any of the work performed by Plaintiffs. Third, Plaintiffs argue that Defendant never properly explained to them the terms and conditions of the Confidentiality Agreement. Fourth, Plaintiffs contend that any information that they did use was public knowledge. Each argument is addressed in turn.

Plaintiffs first argue that neither Confidentiality Agreement is valid because Defendant failed to sign the agreements. Plaintiffs' argument is flawed. A written contract need not be signed by both parties to be valid. See, e.g., 17A Am. Jur. 2d Contracts § 185 at 196 (1991). Instead, the contract is valid if one party signs it and the other acquiesces to its terms. Id; see also 1 Corbin on Contracts § 31 at 114 (1963)("the making of a valid contract requires no writing whatever; and even if there is a writing, there need be no signatures . . . .")

The record shows that both Riley and Kunimitsu signed the Confidentiality Agreement form. (Lee T. Kunimitsu Decl., June 14, 1999, ¶2; Randell A. Riley Decl., June 14, 1999, ¶2.) It also appears from the record that neither Riley nor Kunimitsu ever received Confidentiality Agreements that had been signed by Defendant. (Id.) This fact, however, does not preclude Defendant from enforcing the Confidentiality

Agreements, so long as Defendant acquiesced to the agreements. Here, it appears that Defendant acquiesced to the terms of the Confidentiality Agreement because Defendant desired to protect its confidential company information from disclosure by employees. (Exh. B to Defendant's Separate and Concise Statement of Facts in opposition to Plaintiffs' Motion for Partial Summary Judgment (Def's Conc. Stmt. in Opp.).) Plaintiffs have neither disputed the fact that Defendant has acquiesced to the Confidentiality Agreement nor presented any facts to demonstrate otherwise. The Confidentiality Agreement is therefore valid and enforceable despite the fact that Defendant may not have signed it.

Plaintiffs cursorily argue that Riley and Kunimitsu provided no consideration to Defendant because they were already employed by Defendant when each signed a Confidentiality Agreement. Plaintiffs' legal premise is incorrect. In an at-will employment situation, a worker who continues to work for the company gives not only his assent but also consideration to any modification of the original employment contract. See, e.g., Carter-v. Kaskaskia Community Action Agency, 322 N.E.2d 574, 576 (Ill. 1974); Gishen v. Dura Corp., 285 N.E.2d 117 (Mass. 1972); Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986); L.G. Balfour Co. v. Brown, 110 S.W.2d 104, 107 (Tex. 1937). Here, the parties do not dispute that both Riley and Kunimitsu were at-will employees. The parties also do not dispute that Riley and Kunimitsu continued to work for Defendant after they had signed a Confidentiality Agreement, which served as a modification of their at-will employment contract. Plaintiffs continuing employment after executing the

Confidentiality Agreement constituted sufficient consideration to support the Confidentiality Agreement contract. Id.

Plaintiffs next argue that the Confidentiality Agreement was limited in scope to only one specific "pipelining" process and that it therefore did not cover any of the work done by Plaintiffs. Specifically, Plaintiffs contend that Bob Barnes, who served as a project manager for Defendant during the time period Plaintiffs signed the Confidentiality Agreement, informed Plaintiffs that the Confidentiality Agreement applied only to a newly patented process for pipelining called "inliner." (Lee T. Kunimitsu Decl., June 14, 1999, ¶2; Randell A. Riley Decl., June 14, 1999, ¶2.) Plaintiffs' interpretation comports neither with the broad language of the agreement nor Defendant's interpretation of the agreement.

The Confidentiality Agreement itself uses broad, sweeping language. For example, the agreement states, in part, "[Plaintiff] has represented that [Plaintiff] will protect the confidential material and information which may be disclosed between EBD and [Plaintiff]." (Exh. 1 to Plaintiffs' Motion for Partial Summary Judgment at 1.) Confidential information is defined as including business records and plans, financial statements, customer lists and records, trade secrets, technical information, products, inventions, product design information, costs, computer programs, and copyrights and other intellectual property. (Id.) Nowhere does the Confidentiality Agreement suggest that the agreement is limited to one specific technological process.

Defendant's understanding of the scope of the Confidentiality Agreement comports with the broad language of the agreement. In particular, Defendant believed that the Confidentiality Agreement applied to Defendant's entire business, and not simply to one particular project or technology. (Exh. B to Def.'s Conc. Stmt. in Opp. at 199.) Defendant alleges that Plaintiffs violated the clear terms of the Confidentiality Agreement by inappropriately using cost, pricing, technical and other confidential information in order to successfully bid on a drywell cleaning project in the County of Hawaii. (Counterclaim 5-8; Def.'s Conc. Stmt. in Opp. at 4-5.) There remains a material issue of fact as to whether the Confidentiality Agreement was limited in scope to one particular technological process. Plaintiffs' interpretation appears to overlook the broad language of the agreement itself and stands in contrast to Defendant's interpretation. Plaintiffs, accordingly, have not carried their burden to demonstrate that there is no genuine issue of material fact regarding the scope of the Confidentiality Agreement.

Plaintiffs also challenge the validity of the Confidentiality Agreement on the grounds that Defendant never properly explained to Plaintiffs the terms and conditions of the agreement. This argument has no merit. It is a general rule of contract law that a party who signs a contract is bound by it and cannot complain that he has not read it or did not understand its contents. See Leong v. Kaiser Foundation Hospitals, 71 Haw. 240, 245 (Haw. 1990); see also Liberty Bank v. Shimokawa, 2 Haw. App. 280, 283-284 (Haw. App. 1981) (a failure to read or understand the contents of a contract does not relieve the signing party of the obligation imposed by it). Here, there is no doubt that

both Riley and Kunimitsu signed a Confidentiality Agreement. Having signed the agreement, they cannot now complain that Defendant failed to explain to them the terms and conditions of the agreement. See id.

Plaintiffs last argue that they did not violate the Confidentiality Agreement because any information they used in connection with their bid for Bid No. 1606 was public information. The Court addresses this argument in Section III of this Order. As explained in that section, information regarding the use of a Vactor truck and accompanying technology is public information that can be readily obtained from such sources as trade magazines and sales representatives. There is no material issue of fact at issue with respect to the use of information surrounding Vactor truck methodology and technology. With respect to the issue of the Plaintiffs' use of confidential cost and pricing information, however, the Court has determined that a genuine issue of material fact remains. Plaintiffs have not set forth sufficient evidence to demonstrate that they used solely public information in calculating their bid on Bid No. 1601. The Court, accordingly, GRANTS Plaintiffs' Motion for Partial Summary Judgment as to Count 1, with respect to use of information surrounding the use of Vactor truck methodology and technology. The Court DENIES Plaintiffs' Motion for Partial Summary Judgment as to the other contract violation allegations of Count 1.

III. Duty of Loyalty

Plaintiffs argue that the Court should not address the issue of a breach of the duty of loyalty because the State of Hawaii has never explicitly

recognized a cause of action for breach of the duty of loyalty in an employer-employee scenario. Plaintiffs suggest that the Court certify this issue to the Hawaii Supreme Court. Plaintiffs also contend that any duty of loyalty claim is barred by the statute of limitations. The Court disagrees with Plaintiffs and therefore will not grant Plaintiffs' summary judgment motion on this issue.

A. Cause of Action for Duty of Loyalty

Pursuant to Rule 13(a) of the Hawaii Rules of Appellate Procedure, a question may be certified if: (1) there is a question concerning the law of Hawaii; (2) which is determinative of the cause; and (3) there is no clear and controlling precedent in Hawaii judicial decisions. See Richardson v. City and County of Honolulu, 802 F. Supp. 326, 344 (D. Haw. 1992). The "[u]se of the certification procedure in any given case `rests in the sound discretion of the federal court.'" Louie v. United States, 776 F.2d 819, 824 (9th Cir. 1985) (quoting Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)). The certification process should not be used to abdicate the duty of the federal courts to decide issues by routinely certifying questions to the state supreme court. See, e.g., Richardson, 802 F. Supp. at 344. In the instant case, the Court finds that certification is not warranted.

The Hawaii Supreme Court did address the issue of whether there exists a cause of action for a breach of the duty of loyalty in the employer-employee context. In the case of Stout v. Laws, 37 Haw. 382 (Haw. 1946), the Court indicated that it would recognize such a cause of action. In Stout, the Hawaii Supreme Court

considered whether three employees of a company - the "superintendent of construction" and two "workmen" - had misappropriated and inappropriately registered their employer's tradename while still employed by their employer. See Stout, 37 Haw. at 383. The employees at issue had used their former employer's company name - "Laws Roofing Company" - in a new business the employees had started after leaving their former jobs. Id. at 386-388. In analyzing this situation, the Stout court stated,

An employee unquestionable owes a duty of loyalty to his employer. Likewise an agent in respect to the subject matter of his agency must exercise the utmost good faith in the furtherance and advancement of the interests of his principal. Agents, as to matters within the scope of their duty, cannot assume positions antagonistic to their employer's interest.

Id. at 392. The Stout court ultimately concluded that the employees had committed constructive fraud and issued-declaratory and injunctive relief to the former employer. Id. at 393.

The language used by the Stout court regarding an employee's duty of loyalty reflects precisely the Restatement Second of Agency's (the "Restatement") definition of the duty of loyalty. According to the Restatement, "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Restatement 2d Agency § 387. Although the Hawaii courts have not precisely addressed this section of the Restatement, Hawaii courts have consistently looked to the Restatement in articulating Hawaii law

on agency. See, e.g., Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Haw. 300 (Haw. Ct. App. 1997) (relying on Restatement 2d Agency § 320, in connection with agent-principal dispute); Southwest Slopes, Inc. v. Lum, 81 Haw. 501 (Haw. Ct. App. 1996) (relying on Restatement 2d Agency § 321). The Stout court's articulation of a duty of loyalty, which closely resembles the Restatement's definition, coupled with the fact that Hawaii courts have consistently looked to the Restatement in the past for legal guidance, strongly suggests that Hawaii courts would find that there exists a cause of action for an employee's breach of a duty of loyalty owed to his employer.

Despite Plaintiffs' protestations to the contrary, numerous jurisdictions recognize a cause of action for an employee's breach of the duty of loyalty. See, e.g., Weiss/Watson v. Lange, 1990 WL 33601 at *2 (S.D. N.Y. Mar. 21, 1990) (employee breaches duty of loyalty owed to employer by competing with employer during period of employment); Knott's Wholesale Foods, Inc. v. Azbell, 1996 WL 697943 at *3 (Tenn. App. Dec. 6, 1996)("duty of loyalty includes, of course, a duty not to compete with the employer during the employment relationship"); Eaton Co p. v. Giere, 971 F.2d 136, 141 (8th Cir. 1992) (duty of loyalty prohibits employee "from otherwise competing with his employer, while he is still employed"); Rehabilitation Specialists, Inc. v. Koering, 404 N.W.2d 301, 304 (Minn. 1987) (same); Stokes v. Dole Nut Co., 41 Cal. App. 4th 285, 295 (Cal. Ct. App. 1995)("[d]uring the term of employment, an employer is entitled to its employees' undivided loyalty"); American Bldgs. Co. v. Pascoe Bldg. Sys., Inc., 392 S.E.2d 860, 864 (Ga. 1990) (when employer discloses its trade secret to an employee in the course of employment, the employee

is bound by fiduciary duty not to use or reveal it for his own personal benefit); TIE Sys., Inc. v. Telcom Midwest, Inc., 560 N.E.2d 1080 (Ill. App. Ct. 1990) (same); Gonzales v. Zamora, 791 S.W.2d 258 (Tex. Ct. App. 1990) (same); Radio TV Reports, Inc. v. Ingersoll, 742 F. Supp. 19, 19-22 (D. D.C. 1990) (employee breached duty of loyalty when he bid against his employer); Higgins v. Medical College of Hampton Roads, 849 F. Supp. 1113, 1119 (E.D. Va. 1994) (employees breached the duty of loyalty by merely participating in negotiations with employer's competitors); see generally Employees' Duty of Loyalty and the Corporate Constituency Debate, 25 Conn. L. Rev. 681, 692 (1993) (summarizing cases that have recognized a duty of loyalty in the employment context). The volume of cases that have found a cause of action for breach of the duty of loyalty in the employment context also suggests that Hawaii courts would similarly find such a cause of action. Plaintiffs have failed to cite a single case wherein a court has been confronted with the issue and then failed to recognize a cause of action for the breach of a duty of loyalty in this context. The Court has located no such cases.

Further support for the fact that Hawaii courts would recognize a cause of action for the duty of loyalty comes from the fact that the State of Hawaii Department of Labor and Industrial Relations (the "DLIR") has recognized that an employee owes a duty of loyalty to his employer. See State of Hawaii Department of Labor and Industrial Relations Decision No. 9602693, September 30, 1996, Exh. K to Defendant's Sep. and Conc. Stmt. of Facts Re: Motion for Summ. Judg. On Count II of Counterclaim (Def.'s

Conc. Stmt. Re: Count II). In that administrative decision, the DLIR considered whether Kunimitsu was entitled to unemployment compensation after Defendant had terminated his employment. The DLIR concluded that Kunimitsu was not entitled to benefits because he had committed "misconduct" while employed by Defendant. In so concluding, the DLIR stated that, "[w]hen an employer hires a worker, loyalty is implicit in the contract of hire." Id. at 3. This recognition of the concept of duty of loyalty by a Hawaii administrative agency suggests to the Court that Hawaii courts would similarly find that an employee owes to his employer an inherent duty of loyalty.

Based on the language used by the Hawaii Supreme Court in Stout, the large volume of other jurisdictions that have recognized a cause of action for an employee's breach of a duty of loyalty, and the DLIR's recognition of the duty of loyalty in this context, the Court finds that Hawaii courts would adopt such a cause of action. The Court therefore need not certify this issue to the Hawaii Supreme Court.

B. Statute of Limitations

Plaintiffs next contend that even if a cause of action exists, Defendants are barred by the applicable statute of limitations. Specifically, Plaintiffs contend that Hawaii Revised Statutes § 657-7, which sets a two-year statute of limitations period, applies to this action because Defendant is bringing a tort cause of action for the breach of the duty of loyalty. Defendant, on the other hand, argues that H.R.S. § 6571, which sets a six-year statute of limitations, applies in this case because Defendant's breach of the duty of loyalty claim is

brought in contract, not tort.[3] The Court finds that H.R.S. § 657-1 applies in this case.

The Hawaii Supreme Court has stated that H.R.S. § 657-7 "has been interpreted to apply to `claims for damages resulting from physical injury to persons or physical injury to tangible interests in property." Au v. Au, 63 Haw. 210, 216 (Haw. 1981) (emphasis in original) (citations omitted). In the Au case, the court was faced with the issue of which limitations period - H.R.S. § 657-1 or H.R.S. § 657-7 - should apply for a fraudulent representation claim that involved damages to a home. In assessing the issue, the Au court stated that "[t]he proper standard to determine the relevant limitations period is the nature of the claim or right, not the form of the pleading." Au, 63 Haw. at 214 (citations omitted). The Au court went on to find that the nature of a fraudulent representation claim -involved no physical injury to any tangible interest in property. See Au, 63 Haw. at 216. Accordingly, the Au court rejected the application of § 657-7, and opted instead for § 657-1(4). The court stated,

Although the end result of the fraudulent representation was physical injury to appellant's tangible interest in property, wherein H.R.S. § 657-7 would seemingly apply, we believe that the instant case falls within the purview of H.R.S. § 657-1(4). The nature of this claim is not the physical injury to property,

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[3] The cause of action for breach of the duty of loyalty must be brought in either contract or tort. This is so because there is no cause of action for tortious breach of contract in the employment context in Hawaii. See Francis v. Lee Enterprises, Inc., 89 Haw. 234 (Haw. 1999).

rather it is the making of the fraudulent representations concerning the condition of the home which induced appellant to purchase it. Since fraudulent representations are not governed by a specific limitations period, the general limitations period set forth in H.R.S. §657-1(4) applies.

Au, 63 Haw. at 216-217 (footnote omitted).[4]

In the instant case, Defendant has alleged no physical injury to either person or property. Instead, Defendant's alleged injury consists of the loss of a contract - a nonphysical, intangible interest. Because Defendant has alleged no physical injury of any sort, the Court finds that it would be inappropriate to apply H.R.S. § 657-7 to Defendant's breach of the duty of loyalty claim. See Au, 63 Haw. at 216-217.

The Court also finds additional support for application of H.R.S. § 657-1 in this case. Specifically, the Court finds that Defendant's duty of loyalty claim is contractual in nature because the claim arises out of the employment contract between Plaintiffs and Defendant. It is well-settled that the employment relationship is a contractual matter. Where there is no express contract, the common law implies the contractual terms into the relationship. See, e.g., Kinoshita v. Canadian Pacific Airlines, 68 Haw. 594 (Haw. 1986) (employment of indefinite duration viewed

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[4] The Hawaii Supreme Court has not since strayed from its position that § 657-7 applies only to physical injury to persons or to tangible interests in property. In fact, in Pele Defense Fund v. Paty, 73 Haw. 578, 597 n.14 (Haw. 1992), the Hawaii Supreme Court reiterated this interpretation of § 675-7.

as employment contract that is terminable at the will of either party); McKinney v. National Dairy Council, 491 F. Supp. 1108, 1110-1111 (D. Mass. 1980) (same). Because the employment situation is contractual, courts that have-considered the duty of loyalty in the employment context have consistently found that a contract statute of limitations applies. See, e.g., Western Electric Co. v. Brenner, 360 N.E.2d 1091, 1094 (N.Y. 1977) (contract statute of limitations applied because "employer-employee relationship is one of contract, express or implied"); United States v. Moore, 765 F. Supp. 1251, 1254 (E.D. Va. 1991) (violation of 18 U.S.C. § 209, which sets forth duty of loyalty for certain employees of the United States government, is contractual in nature and accordingly contract statute of limitations applies); United States v. Boeing Co., 845 F.2d 476, 482 (4th Cir. 1988), rev'd on other grounds, 494 U.S. 152 (1990) (acceptance of remuneration by government employee from source other than the United States constitutes a breach of the duty of loyalty, and is contractual in nature; six-year contract statute of limitations therefore applies). Plaintiffs have cited to no cases in which the court applied a tort statute of limitations for a duty of loyalty claim.

Here, Defendant alleges that Plaintiffs misappropriated confidential information they obtained while employed by Defendant, and then used that information to formulate a bid on Bid No. 1606. This allegation arises directly out of the at-will employment contract between Plaintiffs and Defendant.[5] Were it not for the existence of the employment contract, no cause

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[5] Neither party disputes that an at-will employment contract existed between Plaintiffs and Defendant.

of action would lie. Because the cause of action derives from the employment contract, the contract statute of limitations - H.R.S. § 657-1, applies.

Based on the Hawaii Supreme Court's holding in Au, 63 Haw. at 216, and based on the fact that this cause of action arises from an employment contract, the Court concludes that H.R.S. § 657-1 applies. Because H.R.S. § 657-1 is a six-year statute of limitations, Defendant has timely filed the duty of loyalty claim. Accordingly, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment as to Count II - Breach of Duty of Employee Loyalty.

IV. Misappropriation of Trade Secrets

Plaintiffs argue that they have not misappropriated any trade secrets because all information they used in formulating their bid and performing the drywell cleaning project on the Big Island of Hawaii was public knowledge. The Court believes there remains a genuine issue of material fact with respect to Defendant's pricing and cost information.

Hawaii's Uniform Trade Secrets Act, Hawaii Revised Statutes § 482B, prohibits the acquisition and use of a trade secret. A trade secret is defined by the Act as,

[I]nformation, including a formula, pattern, compilation, program device, method, technique, or process that:

(1) Derives independent economic value, actual or potential, from not being generally know to, and not

being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

H.R.S. § 482B. A trade secret does not include any information that is obtained through "proper means." See Uniform Trade Secrets Act, Commissioner's Comment to § 1 (1985); H.R.S. §482B. "Proper means" include, among other things, the fact that defendant learned of the trade secret through independent discovery, public literature, public displays or advertising, or from the information's obviousness. See Uniform Trade Secrets Act, Commissioner's Comment to § 1. In order to gain trade secret protection, a party must take reasonable precautionary measures to ensure the secrecy of the product or technology at issue. H.R.S. § 482B-2. The efforts required to maintain secrecy are those "reasonable under the circumstances." Uniform Trade Secrets Act, Commissioner's Comment to §1.

A. Use of Vactor Truck Technology

Plaintiffs contend that Defendant's use of a Vactor truck to clean drywells is not a protected trade secret because information surrounding use of Vactor trucks is public information that Plaintiffs acquired through "proper means." The Court agrees with Plaintiffs.

Both Riley and Kunimitsu stated in their declarations that the use of Vactor trucks and the

technology of such trucks is information that is freely available to the public. (Lee T. Kunimitsu Decl., June 14, 1999, 1 7; Randell A. Riley Decl., June 14, 1999, Q 8.) According to Plaintiffs' declarations a Vactor pumping truck is a truck that uses high pressure water hoses to wash down the sides of a drywell or culvert and then suck up the debris through a vacuum. (Id.) Riley stated that he had used similar technology when cleaning sewer lines before he was employed by Defendant and that he had observed other individuals in Hawaii use similar technology to clean drywells and culverts. (Randell A. Riley Decl., June 14, 1999, ¶8.) Riley also indicated that he had read articles in trade magazines that described the use of such vacuum pumping equipment in the cleaning of drywells and culverts. In support of Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs submitted copies of numerous trade magazine advertisements and articles surrounding the use of such technology. (Plaintiffs' Suppl. Exh. in Supp. of Plaintiffs/Counterclaim Defendants' Motion for Partial Summ. Judg.) In addition, Riley stated that Defendant had performed a demonstration on how the Vactor truck worked in cleaning drywells and culverts to employees of the State of Hawaii. (Randell A. Riley Decl., June 14, 1999, ¶10.) Riley also stated that Marty Coe, a man who sells Vactor trucks, explained to Riley that the use of the Vactor truck technology is the same on the mainland as in Hawaii. (Id. at ¶8.) Finally, after Kamaaina Pumping purchased a Vactor truck, Plaintiffs received a video tape and instruction manual, which explained the proper use of the truck. (Id.) Kunimitsu's declaration regarding the use and technology of Vactor trucks mirrored that of Riley.(Lee T. Kunimitsu Decl., June 14, 1999, ¶7.)

Defendant has not presented any evidence to contradict Plaintiffs' declarations regarding the use of Vactor truck technology. Nor has Defendant presented any evidence to demonstrate that the use of a Vactor truck to clean drywells is information that is not freely available to the public. The evidence submitted by Plaintiffs, on the other hand, demonstrates that Vactor trucks and the technology used by Vactor trucks is ascertainable by "proper means." This is so because information regarding the Vactor truck technology can be readily found in published trade magazines and through companies that sell Vactor trucks. In addition, Defendant has not countered Plaintiffs' contention that Defendant publically demonstrated how to use a Vactor truck to clean drywells and culverts. Such a public demonstration suggests that the technology is not a trade secret because Defendant did not take precautionary measures to keep the Vactor truck technology a secret in the first place. See Uniform Trade Secrets Act, Commissioner's Comment to § 1. Because Vactor truck technology is freely available to the public, and because Defendant did not take proper measures to keep its Vactor truck method a secret, the Court GRANTS Plaintiffs' Motion for Partial Summary Judgment on Count III, as to the misappropriation of information surrounding the use of Vactor truck methodology and technology.

B. Use of Cost and Pricing Information

Plaintiffs argue that all cost and pricing information used by Defendant was publically available information. The Court finds that there is a genuine issue of material fact as to this issue.

Although neither the Hawaii Uniform Trade Secrets Act nor Hawaii caselaw addresses the issue of whether cost and pricing information is a trade secret, a number of other courts have given such information trade secret protection. See, e.g., Support Systems Associates, Inc. v. Tavolacci, 522 N.Y.S.2d 604, 606 (N.Y. App. Div. 1987)("The [cost and pricing] information compiled by the plaintiff in generating the . . . proposals was highly confidential and entitled to trade secret protection."); SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1260 (3d Cir. 1985)("`(C]osting' and `pricing' information is a whole range of data relating to materials, labor, overhead, and profit margin . . . . We believe such information qualifies for trade secret protection."); Ecolaire Inc. v. Crissman, 542 F. Supp. 196, 206 (E.D. Penn. 1982). The Court believes that the reasoning of these cases comports with the broad reach of the Uniform Trade Secrets Act. See Uniform Trade Secrets Act, Commissioner's Comment to § 1 (definition of "trade secret" in Uniform Act substantially broader than definition provided by the Restatement of Torts (First)). The Court therefore holds that cost and pricing information may be entitled to protection under the Hawaii Uniform Trade Secrets Act when a company takes reasonable precautionary measures to keep the information secret.

In this case, Defendant contends that Plaintiffs misappropriated both cost and pricing information. With regard to cost information, Defendant alleges that Plaintiffs had insider knowledge of cost factors such as the necessary equipment and number of employees required to perform drywell cleaning, and then used that information to determine cost factors for Bid No. 1606. Plaintiffs contend, on the other hand, that all cost

information they used came from information they received from the County of Hawaii regarding previous bids made by other companies. (Lee T. Kunimitsu Decl., June 14, 1999, ¶9; Randell A. Riley Decl., June 14, 1999, ¶11.) Plaintiffs' blanket statement that they used only information from prior bids does not settle this issue.

It appears to the Court that calculation of cost and pricing factors is a rather complex task that would require utilization of experience and prior industry knowledge. Merely looking to past bids that are now public would not likely give a bidder enough information to calculate cost factors for a current bid. This is so because "cost" information is a broad term that refers to "a whole range of data relating to materials, labor, overhead, and profit margin, among other things." SI Handling Systems, Inc., 753 F.2d at 1260. Here, Plaintiffs do not dispute Defendant's assertion that Plaintiffs worked for Defendant for a number of years and had learned information about the necessary factors that went into a drywell cleaning project. (Declaration of Jeffrey Iwasaki-Higbee, Exh. D to Defendant's Separate and Concise Statement of Facts in opposition to Plaintiffs' Motion for Partial Summary Judgment, ¶8.) The fact that Plaintiffs had gained drywell cleaning experience while working for Defendant and learned information regarding the costs associated with the cleaning, suggests to the Court that Plaintiffs may have used cost information obtained during their employment with Defendant when calculating their bid for Bid No. 1606. Plaintiffs' broad contention that they used past bid information published by the State of Hawaii is not conclusive.

With regard to the issue of pricing information, Defendant alleges that Higbee told Riley that Defendant was going to bid on Bid No. 1606 and "rollback" its prices by 10%, and that Plaintiffs then used that information in formulating their bid on Bid No. 1606. Plaintiffs contend that Higbee fabricated the claim that he told Riley about a price rollback. In support of this contention, Plaintiffs state that Kamaaina Pumping actually bid less than Defendant on numerous tasks that were part of Bid No. 1606. Plaintiffs cite to Exhibit 2 to Plaintiffs' Motion for Partial Summary Judgment to support their contention. Exhibit 2, though, does not support Plaintiffs' argument.

An examination of that exhibit reveals that Kamaaina Pumping substantially underbid Defendant on all 8 sites that were a part of Bid No. 1606. Exhibit 2 also reveals that Plaintiffs underbid Defendants with respect to substantially all of the numerous component tasks that made up the total bid for each site. Such underbidding suggests, if anything, that Plaintiffs may have used information regarding a price "rollback" by Defendant in calculating Kamaaina's bid. Simply put, Plaintiffs have not set forth any credible evidence to show that Higbee fabricated his claim. Nor have Plaintiffs presented any persuasive evidence to demonstrate that Plaintiffs used solely public pricing information in formulating their bid on Bid No. 1606.

Because Plaintiffs have not set forth evidence negating the information suggesting that they used cost and pricing information obtained during their employment for Defendant when calculating their bid for Bid No. 1606, an issue of material fact remains. The

Court DENIES Plaintiffs' Motion for Partial Summary Judgment as to Count III, with respect to the misappropriation of Defendant's confidential cost and pricing information.

Defendant's Motion for Summary Judgment on Count II of the Counterclaim

Defendant argues that summary judgment is warranted as to Count II - Duty of Loyalty, for two reasons. First, Defendant contends that the State of Hawaii Department of Labor and Industrial Relations (the "DLIR"), has already decided this precise issue and that the DLIR's decision should be given a preclusive effect. Second, Defendant argues that facts of this case demonstrate that Plaintiffs have breached their duty of loyalty as a matter of law. The Court will address each argument in turn.[6]

I. Preclusive Effect of Administrative Decisions

Both Riley and Kunimitsu applied for unemployment insurance benefits with the DLIR after they were discharged by Defendant. (Exh. H, I, J to Defendant's Concise Statement of Facts Re: Motion for Summary Judgment on Count II of the Counterclaim.) The DLIR denied both claims. In the denials the DLIR stated that the reason for the denial was that Plaintiffs

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[6] Plaintiffs have argued in their Memorandum in opposition to Defendant's Motion that Defendant is barred by the statute of limitations from bringing a duty of loyalty claim. This argument is addressed above, in Section II. B. of this order. As explained in that section, Defendant is not barred by the statute of limitations from bringing a duty of loyalty claim. The Court need not reiterate its analysis here.

had competed against Defendant while still employed by Defendant. (Id.) Defendant now argues that the DLIR's decision denying Plaintiffs' benefits should be accorded a collateral estoppel effect by this Court. Specifically, Defendant contends that the DLIR already determined the issue of whether Plaintiffs breached a duty of loyalty owed to Defendant. The Court disagrees with Defendant's argument.

Collateral estoppel is a preclusionary rule within the res judicata doctrine. See Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215-216 (Haw. Ct. App. 1983); Tradewind Insurance Co., Ltd. v. Stout, 85 Haw. 177, 184 (Haw. Ct. App. 1997). Collateral estoppel or issue preclusion "precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim." Rosa, 4 Haw. App. at 215. (citations omitted). The doctrine applies when the following three-prong test is satisfied:

(1) the issue decided in the prior suit is identical to the issue presented in the action in question; (2) there was a final judgment on the merits in the prior suit; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior suit.

Tradewind, 85 Haw. at 184. These principles are tempered by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues. See Bush v. Watson, 81 Haw. 474, 480 (Haw. 1996). The Supreme Court has made it clear that courts may give preclusive collateral estoppel effect to administrative proceedings when the "administrative agency is acting:: in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an

adequate opportunity to litigate. . . ." University of Tennessee v. Elliot, 478 U.S. 788, 797-798 (1986) (citation omitted).

Defendant has not adequately demonstrated that the precise issue at stake in Defendant's Motion for Summary Judgment on Count II is the identical issue presented in the Plaintiffs' hearings before the Department. At issue in the administrative hearing was whether Plaintiffs committed "misconduct" while employed by Defendant. (Exh. H, I, J to Def.'s Conc. Stmt. Re: Count II.) Defendant has not shown that a determination regarding Plaintiffs' "misconduct" is equivalent to a breach of the duty of loyalty.

Even if employee "misconduct" is equivalent to a breach of the duty of loyalty, Defendant has failed to demonstrate that the procedures employed by the Department sufficiently afforded Plaintiffs a full and fair opportunity to litigate the duty of loyalty issue. Defendant has stated that Plaintiffs were allowed to have an attorney present and that Plaintiffs were able to testify during a hearing. These facts, however, do not establish conclusively that Plaintiffs had an adequate opportunity to litigate the duty of loyalty issue.

The case of Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1283 (9th Cir. 1986), is enlightening on this issue. The Mack court, which considered the denial of an employee's unemployment benefits claim, did not accord preclusive effect to an administrative decision denying the claims. The Mack court found that the employee did not have an adequate opportunity to litigate the claims at issue in the agency action, for two reasons. First, the Mack court noted that

the employee had little incentive to aggressively litigate such an administrative decision. The court stated, "[a]n employee's incentive to litigate an unemployment benefits claim is generally much less than his incentive to litigate a discrimination claim where generally the stakes are much higher. When the amount in controversy in the first action is much less than the amount in controversy at the second, preclusion would be unfair." Id. at 1284. Second, the court pointed out that the administrative process did not present the necessary formalities to allow the employee to adequately litigate a claim. According to the court, "the instant case involves a remedial statute `administered informally without resort to technicalities that might deprive the unsophisticated applicant of his rights to benefits.'" Id. (citation omitted). Here, as in Mack, the employees - Plaintiffs - did not have the same incentive to fully litigate the duty of loyalty issue as they do in the instant action, where):a larger amount of money is at stake. Also similar to the scenario in Mack, the DLIR's administrative process is a speedy, informal administrative process. These facts suggest to the Court that Plaintiffs did not have an adequate opportunity to fully litigate the duty of loyalty issue. Defendant has cited to no case in which a Hawaii court has afforded preclusive effect to a decision by the DLIR, and the Court has located no such case. The Court is not prepared at this point to create novel law recognizing the collateral estoppel effect of an administrative decision by the State of Hawaii Department of Labor and Industrial Relations.

II. Breach of the Duty of Loyalty as a Matter of Law

Defendant contends that Plaintiffs, as a matter of law, have breached their duty of loyalty owed to Defendant. The Court agrees, and accordingly GRANTS Defendant's Motion for Partial Summary Judgment on Count II of the Counterclaim.

Plaintiffs argue that a genuine issue of material fact remains because Defendants have stated in declarations that Riley told Bob Barnes, a project manager for Defendant, that Plaintiffs were planning on forming an independent company to bid on Bid No. 1606. (Lee T. Kunimitsu Decl., July 29, 1999, ¶ 2; Randell A. Riley Decl., July 29, 1999, ¶ 8.) The Court finds that Plaintiffs' declarations on this issue are disingenuous because they directly conflict with prior sworn testimony given by Plaintiffs. In particular, each Plaintiff applied to the State of Hawaii Department of Labor and Industrial Relations in order to gain unemployment benefits. (Exh. H, I, K to Def.'s Conc. Stmt. of Facts Re: Count II.) Each Plaintiff, during his DLIR hearing, gave sworn testimony regarding his employment with Defendant. During that testimony, each Plaintiff unequivocally stated that he had not disclosed to Defendant that he planned on competing against Defendant for Bid No. 1606. (Exh. A, B to Defendant's Reply Memo. in Supp. of Mtn. for Summ. Judg. on Count II of the Counterclaim.)

Plaintiffs are now attempting to circumvent their prior sworn testimony in order to create an issue of fact regarding whether they breached their duty of loyalty owed to Defendant. A court need not consider

such contradictory statements. Cf. Foster v. Arcata Associates, Inc., 772 F.2d 1453, 1462 (9th Cir. 1985)("[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."); Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Cir. 1975). The Court in this instance will not consider Plaintiffs' statements because they flatly contradict Plaintiffs' prior testimony.[7] Accordingly, Plaintiffs' declarations regarding their alleged statements to Barnes do not create a genuine issue of material fact.

Plaintiffs have not demonstrated that a genuine issue of material fact remains on Defendant's breach of loyalty cause of action. A definition identifying the exact parameters of loyalty has eluded the courts. See, e.g., Weiss/Watson, 1990 WL 33601 at *2 ("The standard of loyalty is measured by no fixed scale."). Courts that recognize a duty of loyalty cause of action make it abundantly clear, however, that an employee breaches his duty of loyalty when he directly competes with his employer. See, e.g., id. (employee who competed against employer by soliciting business from employer's clients breached duty of loyalty); Radio TV Reports, Inc., 742 F. Supp. at 21 (employee breached duty of loyalty owed to employer when he bid against employer on media monitoring contract); Stokes, 41 Cal. App. 4th at 295 (employee that establishes business that would be in competition with employer breaches duty of loyalty); Knott's Wholesale Foods, Inc., 1996

[7] Both Plaintiffs were represented by counsel at the DLIR hearing.

WL 697943 at *3 ("duty of loyalty includes, of course, a duty not to compete with the employer during the employment relationship"); Eaton, 971 F.2d at 141 (duty of loyalty prohibits employee "from otherwise competing with his employer,-while he is still employed."); Rehabilitation Specialists, Inc., 404 N.W.2d at 304 (same).

The undisputed facts in the instant case clearly demonstrate that Plaintiffs competed against Defendant while still employed by Defendant. Between January 1996 to June 5, 1996, Plaintiffs were employees of Defendant. (Def.'s Conc. Stmt. Re: Count II at ¶1.)[8] In November 1995, while employed by Defendant, Plaintiffs executed a "General Partnership Agreement" for Kamaaina Pumping. (Id. at ¶2.) While still employed by Defendant, Plaintiffs, as general partners of Kamaaina Pumping, submitted a price proposal to furnish drywell and culvert cleaning and maintenance services for the Department of Public Works, County of Hawaii in response to the Invitation for Bid No. 1606 ("Bid No. 1606"). (Id. At ¶3.) The County of Hawaii received only two bids for Bid No. 1606 - that of Plaintiffs and that of Defendant. (Id. at ¶5.) Kamaaina Pumping was the lowest bidder on Bid No. 1606 and was awarded the public bid. (Id. at ¶ 6.) In March 1996, Kamaaina Pumping entered into a contract with the County of Hawaii to furnish drywell and culvert cleaning and maintenance for the Department of Public

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[8] Plaintiffs have not disputed paragraphs 1 through 10 of Defendant's Separate and Concise Statement of Facts. (Plaintiffs' Separate and Concise Statement of Facts Accepting the Facts in Defendant/Counterclaimant Eckard Brandes, Inc.'s Concise Statement of Facts in Support of Its Motion for Summary Judgment as to Count II of the Counterclaim.)

Works, County of Hawaii for Bid No. 1606. (Id. at ¶7.) These undisputed facts unequivocally demonstrate that Plaintiffs directly competed against Defendant. By engaging in such direct competition while still employed by Defendant, Plaintiffs breached a duty of loyalty owed to Defendant. See, e.g., Stokes, 41 Cal. App. 4th at 295. Because Plaintiffs breached their duty of loyalty, the Court GRANTS Defendant's Motion for Summary Judgment on Count II of the Counterclaim.

CONCLUSION

With respect to each motion filed, the Court concludes as follows.

I. Defendant and Counterclaimant Eckard Brandes, Inc.'s Motion for Summary Judgment on the Amended Complaint.

A. The Court GRANTS Defendant's Motion as to Plaintiffs' overtime compensation claims under the FLSA.

B. The Court DENIES Defendant's Motion with respect to Riley's claims for overtime compensation for the Enchanted Lakes and WWTP projects.

C. The Court GRANTS Defendant's Motion with respect to Riley for all projects other than Enchanted Lakes and WWTP.

D. The Court DENIES Defendant's Motion as to Kunimitsu's claims for overtime compensation, which Plaintiffs limited to the Enchanted Lakes

and WWTP projects, under Hawaii state law.

II. Plaintiffs/Counterclaim Defendants Randell A. Riley, Lee T. Kunimitsu and Kamaaina Pumping's Motion for Partial Summary Judgment as to Counterclaims for Count I - Breach of Contract, Count II - Breach of Duty of Employee Loyalty and Count III - Misappropriation of Trade Secrets.

A. The Court DISMISSES all counterclaims as to Kamaaina Pumping.

B. The Court GRANTS Plaintiffs' Motion as to Count I - Breach of Contract, with respect to use of information surrounding the use of Vactor truck methodology and technology. The Court DENIES Plaintiffs' Motion for Partial Summary Judgment as to all other contract violations allegations of Count I.

C. The Court DENIES Plaintiffs' Motion as to Count II - Duty of Loyalty.

D. The Court GRANTS Plaintiffs' Motion as to Count III - Misappropriation of Trade Secrets - with respect to Plaintiffs' use of Vactor truck methodology and technology. The Court DENIES Plaintiffs' Motion as to Plaintiffs' use of Defendant's cost and pricing information.

III. Defendant's Motion for Summary Judgment on Count II, the duty of loyalty, of the Counterclaim.

The Court GRANTS Defendant's Motion.

IV. Plaintiffs/Counterclaim Defendants Randell

A. Riley, Lee T. Kunimitsu and Kamaaina Pumping's Motion for Certification of Question of State Law to the Hawaii Supreme Court and Stay Pending State Court's Decisions is DENIED.

THE CLAIMS REMAINING ARE AS FOLLOWS.

I. Plaintiffs' Amended Complaint:

A. Plaintiffs' Overtime Compensation claims under Hawaii state law with respect to Riley and Kunimitsu for the following two projects: Enchanted Lakes Project and WWTP project.

II. Defendant's Counterclaim:

A. Count I - Breach of Contract. Defendant's breach of contract claims remain on all issues except issues regarding the use of Vactor truck methodology and technology.

B. Count II - Breach of Duty of Loyalty. The only remaining issue is the damages Defendant suffered due to the breach.

C. Count III - Misappropriation of Trade Secrets. The only. remaining issue is whether or not Plaintiffs misappropriated Defendant's cost and pricing information.

D. Count IV - Interference with Business Expectancy.

E. Count V - Punitive Damages and Attorneys' Fees.

III. There are no claims remaining with respect to Kamaaina Pumping, Inc.

IT IS SO ORDERED.

DATED : Honolulu, Hawaii, 10-22-99.

s/ Helen Gillmore
HELEN GILLMOR
United States District Judge

Randell A. Riley, et al. v. Eckard Brandes, Inc., Civil No. 9800779 HG; Order Granting Defendant and Counterclaimant Eckard Brandes, Inc.'s Motion for Summary Judgment on the Amended Complaint and

Order Granting in Part and Denying in Part Plaintiffs/Counterclaim Defendants Randell A. Riley, Lee T. Kunimitsu and Kamaaina Pumping's Motion for Partial Summary Judgment as to Counterclaims for Count 1 - Breach of Contract, Count II - Breach of Duty of Employee Loyalty and Count III - Misappropriation of Trade Secrets and

Order Granting Defendant's Motion for Summary Judgment on Count II of the Counterclaim and Order Denying Plaintiffs/Counterclaim Defendants Randell A. Riley, Lee T. Kunimitsu and Kamaaina Pumping's Motion for Certification of Question of State Law to the Hawaii Supreme Court and Stay Pending State Court's Decision

Appendix D

***Minute Order* dated November 18, 1999, by Clerk Hisashima ; *Riley et al. v. Eckard Brandes, Inc.*, (Civil No. 98-0779, USDC, D.Haw.)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RANDELL A. RILEY and LEE T. KUNIMITSU
Plaintiffs,

v.

ECKARD BRANDES, INC.,
Defendant.

and

All related claims.

Civil No. 98-0779 HG

MINUTES

CASE NUMBER: CIVIL NO. 98-00021

CASE NAME: Randell A. Riley and Lee T. Kunimitsu v. Eckard Brandes, Inc.

ATTYS FOR PLA: Randall Harakal Junsuke Otsuka

ATTYS FOR DEFT: Ernest H. Nomura Elena J. Onaga

INTERPRETER:

JUDGE: Helen Gillmor REPORTER: Stephen Platt

DATE: November 18, 1999 TIME: 9:00 - 10:20

COURT ACTION: After hearing from the parties and considering the parties' pleadings, the Court held:

1.Plaintiffs' Motion for Reconsideration of Order Granting Defendant and Counterclaimant Eckard Brandes, Inc.'s Motion for Summary Judgment on the Amended Complaint and Order Granting in Part and Denying in Part Plaintiffs/Counterclaim Defendants Randell A. Riley, Lee T. Kunimitsu and Kamaaina Pumping's Motion for Partial Summary Judgment as to Counterclaims for Count I - Breach of Contract, Count II - Breach of Duty of Employee Loyalty and Count III - Misappropriation of Trade Secrets and Order Granting Defendant's Motion for Summary Judgment on Count H of the Counterlcaim, filed on November 1, 1999.

The Court DENIES Plaintiffs' motion for reconsideration.

2. Plaintiffs' Motion in Limine Regarding Evidence of Damages Relating to Breach of Fiduciary Duty of Loyalty, Misappropriation of Trade Secrets, Interference with Business Expectancy, Punitive

Damages and Attorneys' Fees, filed on October 26, 1999, which plead H.RS. Chapter 103D is the exclusive remedy available to the counterclaimants.

The Court DENIES Plaintiffs' motion.

3. Plaintiffs' Motion for Certification of Question of State Law Regarding Exclusivity of Remedies Under HRS § 103D-704 to the Hawaii Supreme Court and Stay Pending State Court's Decision, filed on October 29, 1999.

The Court DENIES Plaintiffs' motion for certification of a question to the supreme court of the state of Hawaii.

4. The parties agreed to the figure of $3,735.76 as being the amount owed to Riley. Defendant waives any objections to this figure, including any basis for the figure that flows from anything other than overtime, and maintains that its duty of loyalty claim prevents Defendant from having to pay this amount to Riley.

5. Defendant shall file a trial brief discussing the issue of the appropriate remedy in this case. Defendant's trial brief on this issue is due by Wednesday November 24, 1999.

6. Plaintiffs and Defendant shall submit revised Findings of Fact and Conclusions of Law that cite to specific exhibits as support. The revised Findings of Fact and Conclusions of Law are due by Wednesday November 24, 1999.

Submitted by: David H. Hisashima, Courtroom Deputy

cc: Randall N. Harakal, Esq./Junsuke Otsuka, Esq.
Ernest H. Nomura, Esq./Elena J. Onaga, Esq.
Judge Gillmor's chambers

Appendix E

Report of Special Master on Defendant's Motion for Attorneys' Fees and Prejudgment Interest and Plaintiffs' Motion for Review of Taxation of Costs by the Clerk dated July 10, 2000, by Mag. Yamashita; *Riley et al. v. Eckard Brandes, Inc.*, (Civil No. 98-0779, USDC, D.Haw.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RANDELL A. RILEY and LEE T. KUNIMITSU
Plaintiffs,

v.

ECKARD BRANDES, INC.,
Defendant.

and

All related claims.

Civil No. 98-0779 HG

REPORT OF SPECIAL MASTER ON DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND PREJUDGMENT INTEREST AND PLAINTIFFS' MOTION FOR REVIEW OF TAXATION OF COSTS BY THE CLERK

On February 24, 2000, Defendant/ Counterclaimant Eckard Brandes, Inc. ("Defendant") filed a Motion for Attorneys' Fees and Prejudgment Interest ("Motion"). On March 23, 2000, Plaintiffs/ Counterclaim Defendants Randell A. Riley and Lee T. Kunimitsu ("Plaintiffs") filed a Memorandum in opposition, to which Defendant filed a Reply on March 30, 2000. Pursuant to Local Rule 53.1 ("L.R."), this matter was referred to this Court as Special Master.

On February 24, 2000, Defendant filed a Bill of Costs. The Clerk of the Court taxed said costs against Plaintiffs on March 3, 2000. On March 10, 2000, Plaintiffs filed a Motion for Review of Taxation of Costs by the Clerk ("Motion to Review Taxation of Costs"). On March 23, 2000, Defendant filed a Memorandum in Opposition to Plaintiffs' Motion For Review of Taxation of Costs by the Clerk. Pursuant to L.R. 53.1, this matter was also referred to this Court as Special Master.

This Court held a hearing on the Motions on April 10, 2000. After careful consideration of the submitted memoranda and the arguments set forth by counsel, this Court, acting as Special Master, GRANTS Defendant's Motions and awards Defendant attorneys' fees in the amount of $87,785.63, prejudgment interest in the amount of $140,457.00, and taxable costs in the amount of $10,934.57 for a total of $239,177.20.

PROCEDURAL BACKGROUND

This action arises out of an employment dispute between Plaintiff employees and Defendant employer. Defendant is in the business of repairing, televising,

and maintaining sewer pipes, culverts, drywells and other structures that convey sewage, debris, and rainwater. On November 1, 1995, while still employed by Defendant, Plaintiffs formed their own partnership, Kamaaina Pumping.

On January 12, 1996, the County of Hawaii published its Invitation for Bid No. 1606, Proposal Specifications for a Price Agreement for Furnishing Drywell and Culvert Cleaning and Maintenance for the Department of Public Works ("Bid No. 1606"). Defendant submitted a bid to the County of Hawaii for the project. Plaintiffs, doing business as Kamaaina Pumping, submitted the only other bid for the project. Because their bid was the lowest of the two, Plaintiffs won the contract with the County of Hawaii, executing the contract on March 27, 1996.

In 1996 and 1997, Kamaaina Pumping received gross revenues from the County of Hawaii totaling $905,790 for services performed pursuant to the contract for Bid No. 1606. In 1996 and 1997, Plaintiffs received income from Kamaaina Pumping paid from the funds Kamaaina Pumping earned from the County of Hawaii pursuant to the contract for Bid No. 1606. During this entire time period, Plaintiffs remained employees of Defendant. Defendant terminated Plaintiffs on June 17, 1996 alleging that Plaintiffs competed with Defendant, while still working for Defendant.

On August 13, 1998, Plaintiffs filed an Amended Complaint in state court to recover unpaid overtime, alleging violations of the Fair Labor Standards Act ("FLSA") and Hawaii Revised Statutes §§ 387-3 and 387-12 (c) (Hawaii Wage and Hourly Laws). On

September 23, 1998, Defendant removed the case to federal court alleging federal question jurisdiction pursuant to 28 U.S.C. § 1331. On September 30, 1999, Defendant filed its Answer to Plaintiffs' Amended Complaint. Also on that day, the Defendant filed a Counterclaim alleging breach of contract, breach of the fiduciary duty of loyalty, misappropriation of trade secrets, and interference with business expectancy under the district court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367 (c) (3) .

On June 14, 1999, Defendant filed a Motion for Summary Judgment on Count II of the Counterclaim: Breach of the Fiduciary Duty of Loyalty.

On October 22, 1999, United States District Court Judge Helen Gillmor issued an Order Granting Defendant's Motion for Summary Judgment on Count II of the Counterclaim. The district court determined that Plaintiffs had breached their duty of loyalty to Defendant. The district court further determined that the only remaining question with respect to the duty of loyalty issue was how to ascertain the damages Defendant suffered due to Plaintiffs' breach.

The Plaintiffs' Amended Complaint and the Counterclaim of Defendant came before the district court for trial on November 18, 1999. Subsequently, on February 9, 2000, the district court entered its Findings of Fact, Conclusions of Law and Order. The court retained supplemental jurisdiction over the state claims and found that Defendant was entitled to repayment of the compensation it paid to each Plaintiff during the period of his disloyalty. The court further found that Defendant was entitled to the equitable

remedy of restitution for Plaintiffs' breach of the fiduciary duty of loyalty owed to Defendant. As an equitable reflection of the amount by which Plaintiffs were unjustly enriched, the court ordered each Plaintiff to disgorge to Defendant the salary paid to him by Kamaaina Pumping in 1996 and 1997 minus the value of his labor during the latter half of 1996 and during 1997. The court awarded the Defendant a combined total of $ 351,142.53 against Plaintiffs. The federal question claim regarding Plaintiffs' overtime was denied on estoppel. The Clerk of the Court entered Judgment against Plaintiffs on February 24, 2000.

By its Motion, Defendant now asks this Court to adjudicate the issues of attorneys' fees and prejudgment interest. Similarly, through their Motion to Review Taxation of Costs, Plaintiffs ask this court to adjudicate the issue of taxable costs. This Court now addresses each specific issue.

DISCUSSION

I. Attorneys' Fees

A. Entitlement

Defendant requests attorneys' fees in the amount of $87,785.63 or twenty-five percent of the judgment pursuant to Hawaii Revised Statute ("HRS") § 607-14.[1] It is well established that in adjudicating

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[1] Section 607-14 provides in part:

> In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in

state law claims brought before a federal court under supplemental jurisdiction, the court is bound to apply the state substantive law. O'Melveny & Meyers v. Federal Deposit Ins. Corp., 512 U.S. 79, 85-89 (holding that in the absence of a conflict with a federal interest, state law claim by the FDIC for a wrongdoing that harmed an insured thrift was governed by state law and not federal common law); see Yount v. Acuff Rose-ODryland, 103 F.3d 830, 835 n.6 (9th Cir. 1996)("California law applies because a federal court exercising jurisdiction over non-federal claims must usually apply the substantive law of the state in which it sits")(citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938)). When state substantive law applies, attorneys' fees are to be awarded in accordance with state law. People of Sioux County, Neb. v. National Surety Co., 276 U.S. 238, 243; Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260 n.31 (1975) (citing 6 Moore's Federal Practice § 54.77(2) (2d ed. 1974)); Helfand v. Gerson, 105 F.3d 530, 536 (9th Cir. 1997). This principle applies to supplemental state claims as well as to diversity cases. Mangold v. California Pub. Utils. Comm'n, 67 F.3d 1470, 1478-79 (9th Cir. 1995).

Under Hawaii law, the prevailing party is entitled to recover only reasonable attorneys' fees and

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> writing that provides for attorneys fees, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; . . . provided that this amount shall not exceed twenty-five percent of the judgment.

Haw. Rev. Stat. § 607-14.

costs permitted by statute, agreement, stipulation, or precedent. See Tirona v., State Farm Mutual Automobile Insurance Co., 821 F. Supp. 632, 635 (D. Haw. 1993); Smothers v. Renander, 633 P.2d 556, 560 (Haw. App. 1978). HRS § 607-14 provides for the assessment of reasonable attorneys fees to the prevailing party for actions "in the nature of assumpsit." Haw. Rev. Stat. § 607-14. An action in the nature of assumpsit is generally a contract action or one which involves a promise from one party to another. Larsen v. Pacesetter Systems, Inc., 837 P.2d 1273, 1298 (1992). The Ninth Circuit has defined assumpsit as a "common law form of action which allows for the recovery of damages for the non-performance of a contract, either express or implied, written or verbal, as well as quasi-contractual obligations." Helfand, 105 F.3d at 537 (citing Schultz v. Honsador, Inc., 690 P.2d 279, 281 (1984)). The Ninth Circuit instructed that "[t]he character of the action should be determined from the facts and issues raised in the complaint, the nature of the entire grievance, and the relief sought." Id. An action in the nature of assumpsit does not need a clause in writing providing for attorneys' fees in order for attorneys' fees to be granted. Eastman v. McGowan, 946 P.2d 1317, 1327 (1997).

Plaintiffs contend that Defendant is not entitled to attorneys' fees because this is not an assumpsit action. Plaintiff argues that because the district court applied the equitable remedy of restitution, there can be no breach of contract action. The Intermediate Court of Appeals of Hawaii, however, has ruled that "from its inception as a form of action for breach of simple contract, assumpsit also evolved as `a vehicle for recovery in quasi contract,' basically to deprive the

defendant of an unjust enrichment.'" Hong v. Kong, 683 P.2d 833, 841 (Haw. App. 1984). The Hong court explained that the equitable remedy of restitution falls within the "nature of assumpsit:"

> Restitution restores a person to the position he formerly occupied, either by the return of something which he formerly had or by the receipt of its equivalent in money. Furthermore, the law of restitution imposes quasi-contractual liability for unjust enrichment upon a person receiving a benefit which it is unjust for him to retain. . . . Indeed, assumpsit will lie upon a promise implied by law, which arises to prevent one man from being inequitably enriched at another's expense. Accordingly, we hold that an action for rescission of an agreement and for restitution of monies paid on account of the agreement is an action in the nature of assumpsit within the meaning of HRS § 607-14.

Id. (internal citations and quotations omitted) (emphasis added).

Thus, restitution as an appropriate remedy for Plaintiffs' breach of the duty of loyalty falls under "an action in the nature of assumpsit" within the meaning of HRS § 607-14.

Plaintiffs further argue that an award of attorneys' fees pursuant to HRS § 607-14 cannot rest upon the equitable remedy of disgorgement because disgorgement is punitive in nature and punitive damages are assumed to include any award of attorneys' fees. Disgorgement, however, serves

primarily to prevent unjust enrichment. SEC v. Hughes Capital Corp., 917 F. Supp. 1080, 1085 (1996) (citing SEC v. First City Financial Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989)). "Disgorgement wrests ill-gotten gains from the hands of a wrongdoer." Hughes, 917 F. Supp. at 1085 (quoting SEC v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993)). It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs and courts have broad discretion in fashioning the equitable remedy of a disgorgement order. Id. The court may exercise its equitable power, however, only over property causally related to the wrongdoing, thus disgorgement may not be used punitively. Hughes, 917 F. Supp. at 1085 (citing First City Financial, 890 F.2d at 1231-32 (D.C. Cir. 1989)) (emphasis added). A defining feature of the disgorgement action is that the amounts disgorged may not exceed the amount of the illicit gain. S.E.C. v. Williams, 884 F. Supp. 28, 30 (D. Mass. 1995). This marked limitation on the court's authority emphasizes the remedial nature of a disgorgement action. Id. Furthermore, courts have consistently distinguished disgorgement from penalties. Id. at 31 (citing S.E.C. v. Lorin, 869 F. Supp. 1117, 1122 (S.D.N.Y. 1994)).

Here, the district court determined that disgorgement is an appropriate means by which to achieve restitution when an employee breaches his fiduciary duty of loyalty owed to his employer. The district court specifically did not order Plaintiffs to disgorge the entire amount paid to Kamaaina Pumping for the contract for Bid No. 1606 because that amount would provide a windfall to Defendant and would ignore the costs associated with performing the work for the project. The district court instead went to great

pains to formulate a remedy that would equitably and accurately reflect the amount by which Plaintiffs were unjustly enriched. Therefore, the district court's order that Plaintiffs disgorge the funds paid to them by Kamaaina Pumping minus the value of their labor during 1996 and 1997 cannot be construed as a punitive damages award.

Plaintiffs argue that Hawaii has no disgorgement statute providing that should a prevailing party receive the remedy of disgorgement, they are then entitled to attorneys' fees and costs. Since it has already been established that the remedy of restitution sounds "in the nature of assumpsit" and that disgorgement is an appropriate means to achieve restitution when an employee has breached his duty of loyalty to his employer, it is clear that the applicable statute is HRS § 607-14.

B. Reasonable Attorneys' Fees

Plaintiffs argue that HRS § 607-14 does not say that the court shall automatically tax twenty-five percent of any judgment, but rather the court needs to make a determination as to whether or not reasonable attorneys' fees should be allowed and what they should be.

Under federal law, reasonable attorneys' fees are based on the traditional "lodestar" calculation, as set forth in Henslev v. Eckerhart, 461 U.S. 424, 433 (1983). In Hensley, the Supreme Court stated that the most useful starting point to determine a reasonable fee is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."

Hensley, 461 U.S. at 433. Once calculated, the lodestar is presumptively reasonable. See Pennsylvania v. Deleware Valley Citizens' Council for Clean Air, 483 U.S. 711, 728 (1987); Cunningham v. County of Los Angeles, 879 F.2d 481, 484 (9th Cir. 1988) cert. denied, 493 U.S. 1035 (1990).

Pursuant to HRS § 607-14, Defendant requests $87,785.63 or twenty-five percent of the total judgment award of $351,142.53. Defendant has submitted a copy of billing statements as an exhibit to its Motion. Defendant has provided a lodestar calculation for each attorney and paralegal resulting in an actual total amount of $163,573.00. In light of the fees actually incurred by Defendant's counsel, this Court, pursuant to HRS § 607-14, awards Defendant attorneys' fees in the amount of $87,785.63.

Hourly Rate

In determining a reasonable hourly rate, the district court must consider "'the experience, skill, and reputation of the attorney requesting fees.'" D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1384 (9th Cir. 1990) (Quoting Chalmers v. City of Los Angeles, 796 F.2d. 1205, 1210 (9th Cir. 1986)). Based upon these factors, the rate should reflect "the prevailing market rate in the community." Id. Moreover, the fee applicant "has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel" to show that the rates are reflective of reasonable prevailing rates for similar services. Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987).

In its Motion, Defendant has provided the hourly rate for each attorney and paralegal involved in this case. Defendant's counsel has also submitted the Declaration of Ernest M. Nomura ("Declaration"). In the Declaration, counsel declares that the standard hourly rates charged by the attorneys and paralegals are consistent with rates commonly charged by others with similar skills, experience, and abilities in this legal community.[2]

Plaintiff did not object to Defendant's counsels' hourly rates. This Court is well aware of the prevailing rates for similar services performed by attorneys of comparable experience, skill, and reputation in this community, and determines the rates charged by Defendant's counsel to be reasonable.

D. Hours Expended

Beyond establishing a reasonable hourly rate, a prevailing party seeking attorneys' fees bears the burden of proving that the fees and costs taxed are associated with the relief requested and are reasonably necessary to achieve the results obtained. See Tirona v. State Farm Mut. Auto Ins. Co., 821 F. Supp. 632, 636 (D. Haw. 1993) (citations omitted).

Plaintiffs did not object to the number of hours expended by Defendant's counsel. Defendant's Declaration notes that the hours claimed were

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[2] Defendant's counsels' billing report reflects the hourly rate for Ernest M. Nomura as $185.00 per hour. Elena J. Onaga's hourly rate is $150.00 per hour. The rate charged by the paralegals is $40.00 per hour.

reasonably and necessarily expended to provide Defendant with a successful defense against Plaintiffs' claim and prosecution on Defendant's counterclaim.

This court has carefully reviewed Defendant's billing records. The time entries carefully and adequately describe each of the tasks performed by Defendant's counsel. Having reviewed the hours expended and the nature of the service rendered in light of the experience of counsel, this Court determines that the hours spent were reasonably necessary to achieve the results obtained.

Given the fact that actual fees far exceed twenty-five percent of the total judgment and based upon the foregoing, this Court, acting as Special Master and pursuant to HRS § 607-14, awards Defendant attorneys' fees in the amount of $87,785.63 reflecting twenty-five percent of the total judgment award of $351,142.00.

II. Prejudgment Interest

"Prejudgement interest, where appropriate, is awardable under HRS § 636-16[3] in the discretion of the

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[3] HRS § 636-16 provides in relevant part:

> In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising . . . by breach of contract, it may be the date when the breach first occurred.

Haw. Rev. Stat. § 363-16.

trial court." Amfac, Inc. v. Waikiki Beachcomber Investment Co., 839 P.2d 10, 36 (1992). Further, HRS § 478-2 provides, "When there is no express or written contract fixing a different rate of interest, interest shall be allowed at a rate of ten percent per year . . . ."

Defendant asks for prejudgment interest on the damages award in the amount of $140,457.00 pursuant to HRS § 636-16 and HRS § 478-2. This amount reflects ten percent of the total award over a four-year period ($351,142.53 x 100 = $35,114.25 x 4 years = $140,457.00).

Plaintiffs argue that HRS § 636-16 is not applicable because the remedy of disgorgement is punitive in nature and this Court has no authority under Hawaii law to award prejudgment interest on punitive damages. The remedy of disgorgement has been adequately addressed above. As disgorgement awards are not punitive in nature, this argument is without merit.

Plaintiffs next argue that equitable remedies are inchoate in nature, taking effect only as of the date of the judgment, and therefore, any prejudgment interest awarded can only run as of the day of the judgment.

However, "[o]ne of the purposes of pre-judgment interest is to cut delays in litigation, and to undo substantial injustice caused by such delays." Ditto v. Mc Curdy, 947 P.2d 961, 982 (Haw. App. 1997) (citing McKeague v. Talbert, 658 P.2d 898 (1983)). The court can award prejudgment interest for any substantial delay in the proceedings, and no purposeful delay on the part of the non-moving party is required. Id.

In this case, the district court found that Plaintiffs had breached their fiduciary duty beginning in January of 1996 and continuing to June of 1996. See Findings of Fact. and Conclusions of Law and Order, filed on February 9, 2000, at 9 n.4. The judgment was not entered until February 24, 2000. Hence, there was a four-year delay from the initial breach until the entry of judgment. Given this significant delay, this Court finds an award of prejudgment interest to be appropriate. Accordingly, this Court, acting as Special Master, GRANTS Defendant's Motion and awards prejudgment interest in the amount of $140,457.00.

III. Taxable Costs

Federal law and not state law controls the issue of whether certain taxable costs are allowable. Erving Paper Mills v. Hudson-Sharp Machine Co., 271 F. Supp. 1017, 1023 (D.C. Wis. 1967). Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P.54(d)(1). The Supreme Court has ruled that courts do not have the discretion under Rule 54(d) to tax whatever costs seem appropriate. Rather, courts may tax only those costs defined in 28 U.S.C. § 1920. Alfex Corp. v. Underwriters Labs, Inc., 914 F.2d 175 (9th Cir.) (citing Crawford Fitting Co., v. J.T. Gibbons, Inc., 482 U.S. 437, 441-42 (1987)). Costs defined in 28 U.S.C. § 1920 include the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenograhic transcript necessarily

obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of the title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

A. Bill of Costs

On February 22, 2000, Defendant filed its Bill of Costs seeking the following costs:

Fees of the Clerk	$175.00
Process Servers	$131.50
Court Reporter Fees	$10,052.83
Witness Fees	$167.50
Photocopies	$423.19
Defendant's Total Requested Costs	$10,934.57

B. Objections

On March 10, 2000, Plaintiffs timely filed their Motion for Review of Taxation of Costs by the Clerk. Plaintiffs assert the following objections to Defendant's Bill of Costs: (1) certain fees of the clerk are vague; (2)

certain process server were ultimately unnecessary; (3) certain fees of the court reporter were ultimately unnecessary to a successful defense and/or prosecution of the case; (4) certain photocopying costs are vague and/or excessive; and (5) certain witnesses were not necessary. In its Memorandum in Opposition to Plaintiffs' Motion for Review of Costs filed March 23, 2000, Defendant argues that if an item falls within 28 U.S.C. § 1920, there is a presumption that the prevailing party is entitled to recover costs absent unreasonable or unnecessary expenses, misconduct by the prevailing party, or a procedural defect in the prevailing party's Bill of Costs.

The Ninth Circuit recently confirmed that the strong presumption in favor of awarding costs to the prevailing party "may only be overcome by pointing to some impropriety on the part of the prevailing party that would justify a denial of costs." Russian River Watershed Protection Comm. V. City of Santa Rosa, 142 F. 3d 1136, 1144 (9th Cir. 1998) (citing National Information Services, Inc. v. TRW, Inc., 51 F.3d 1470, 1471-72 (9th Cir. 1995)). Plaintiffs provide no evidence of any misconduct committed by Defendant nor do Plaintiffs object to Defendant's Bill of Costs based upon any procedural defect. Accordingly, this Court finds that taxation of costs in favor of Defendants is appropriate and will now address each specific item.

C. Review of Requested Costs

1. Fees of the Clerk

Defendant seeks taxation of fees totaling $160.00.[4] Defendant removed this case from state court and therefore, incurred and paid the standard filing fee for civil actions in federal court. The requested fees are permissible pursuant to 28 U.S.C. § 1920(1). Accordingly, Defendant is entitled to $160.00 in fees of the clerk.

2. Process Server Fees

Defendant seeks $131.50 in process server fees for service of summons and subpoenas. This item is permissible pursuant to 28 U.S.C. § 1920(1). Accordingly, Defendant is entitled to $131.50 in process server fees.

3. Court Reporter Fees

Defendant seeks $10,052.38 in court reporter fees for various depositions. Plaintiffs object to the taxation of certain deposition transcript costs on the ground that they were not ultimately necessary in the successful defense or prosecution of Defendant's case.

Fees incurred obtaining deposition transcripts may be recovered under 28 U.S.C. § 1920(2). Association of Flight Attendants v. Horizon Air Indus., Inc., 976 F.2d 541, 551 (9th Cir. 1992). Deposition costs are recoverable only if necessarily obtained for use in

[4] This includes a $10.00 certification fee.

the case. Alflex Corp. v. Underwriter's Labs, Inc., 914 F.2d 175, 177-78 (9th Cir. 1990). The critical time that determines whether a deposition is necessary is the time when the deposition was taken. Jop v. City of Hampton, 163 F.R.D. 486, 488 (E.D. Va. 1995); Board of Directors, Water's Edge v. Anden Group, 135 F.R.D. 129, 133 (E.D. Va. 1991). Deposition transcripts do not have to be introduced at trial in order to be taxed as costs and costs are taxable if the deposition was reasonably necessary for preparation for trial at time it was taken. See id. Based upon the dated deposition receipts provided by Defendant and this Court's knowledge that all deponents in the instant case were involved in and necessary to the proceedings at the time said depositions were taken, this Court finds these costs to be necessarily obtained for use in the case. Accordingly, this Court finds that the requested court reporter fees of $10,052.38 are both reasonable and permissible under 28 U.S.C. § 1920(2).

4. Witness Fees

Defendant seeks witness fees of $167.50 for five witnesses. Section 1920(3) permits taxation of costs for "[f]ees and disbursements of . . . witnesses." The Supreme Court has made it clear that unless the witness is court appointed, witness fees shall be taxed at the statutory rate pursuant to 28 U.S.C. § 1821(b), $40.00 per day. Crawford Fitting v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). 28 U.S.C. § 1821(a)(1) authorizes witness fees for those witnesses "in attendance at any court of the United States, . . .or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States." 28 U.S.C. § 1821(a)(1).

Defendant's requested fees of $167.50, reflecting $40.00 or less per witness for attendance at depositions, are both reasonable and permissible under 28 U.S.C. § 1920(3).

5. Photocopies

Defendant seeks photocopy charges of $423.19. 28 U.S.C. § 1920(4) permits taxation for copies of papers "necessarily obtained for use in the case." The practice of this Court is to award $.10 per page for copies made in-house that were necessarily obtained for use in the case. Plaintiffs do not dispute that Defendant is entitled to recover the cost for in-house copying at $.10 per page. Plaintiffs object, however, to the fact that Defendant did not detail in its Bill of Costs what was copied in-house. Indeed, copying costs are generally not recoverable when there is no showing of the nature of the documents copied. American Key Corp. v. Cumberland Assoc., 102 F.R.D. 496, 499 (N.D. Ga. 1984). Defendant, however, remedied this lack of specificity by providing copies of its pleadings files indices in its Memorandum in opposition to Plaintiffs' Motion For Review of Taxation of Costs. See Exhibit C to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Review of Taxation of Costs by the Clerk. Thus, Defendant is entitled to copy charges totaling $423.19.

Based on the foregoing, Defendants are entitled to taxation of the following costs:

Fees of the Clerk	$160.00
Process Server Fees	$131.50
Court Reporter Fees	10,052.38

Witness Fees	$167.50
Photocopies	$423.19
Defendant's Total Taxable Costs	10,934.57

CONCLUSION

Based on the foregoing, this Court, acting as Special Master awards Defendant attorneys' fees in the amount of $87,785.63, prejudgment interest in the amount of $140,457.00, and taxable costs in the amount of 10,934.57 for a total of $239,177.20.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii: JUL 1 0 2000.

s/ Francis I. Yamashita
FRANCIS I YAMASHITA
United States Magistrate Judge

RANDELL A. RILEY, et al. vs. ECKARD BRANDES, INC.; CIVIL NO. 9800779 HG; REPORT OF SPECIAL MASTER ON DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND PREJUDGMENT INTEREST AND PLAINTIFFS' MOTION FOR REVIEW OF TAXATION OF COSTS BY THE CLERK

Appendix F

***Order* dated October 22, 2003 by Panel *Eckard Brandes, Inc. v. Riley et al.*, (Ninth Circuit Case Nos. 00-15474 & 01-1730)**

Nos. 00-15474 & 01-1730

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECKARD BRANDES, INC.,
Counter-claimant-Appellee,

v.

RANDELL A. RILEY; LEE T. KUNIMITSU, Counter-defendants-Appellants, and KAMAAINA PUMPING, a Hawaii general partnership, Counter-defendant.

and

All related claims.

Order

Before: SCHROEDER, Chief Judge, ALARCON, and FISHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing

en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed.R.App. P.35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Appendix G

***Order* dated October 31, 2003 by Panel *Eckard Brandes, Inc. v. Riley et al.*, (Ninth Circuit Case Nos. 00-15474 & 01-1730)**

Nos. 00-15474 & 01-1730

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECKARD BRANDES, INC.,
Counter-claimant-Appellee,

v.

RANDELL A. RILEY; LEE T. KUNIMITSU, Counter-defendants-Appellants, and KAMAAINA PUMPING, a Hawaii general partnership, Counter-defendant.

and

All related claims.

Order

Before: SCHROEDER, Chief Judge, ALARCON, and FISHER, Circuit Judges.

The order filed on October 22, 2003 denying the petition for panel rehearing and the petition for

rehearing en banc is amended to include case number 01-17307.

Appendix H

***Amend Judgment* dated September 20, 2000 by J. Gillmore; *Riley et al. v. Eckard Brandes, Inc.*, (Civil No. 98-0779, USDC, D.Haw.)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RANDELL A. RILEY and LEE T. KUNIMITSU
Plaintiffs,

v.

ECKARD BRANDES, INC.,
Defendant.

and

All related claims.

Civil No. 98-0779 HG

Amended Judgment

WHEREAS Counterclaimant/Defendant ECKARD BRANDES, INC.'s Counts I, III, and IV having been dismissed by Stipulation entered November 5, 1999;

WHEREAS Plaintiff/Counterclaim Defendant

LEE T. KUNIMITSU's claims being dismissed by Order entered October 22, 1999 and Stipulation entered November 16, 1999;

WHEREAS Counterclaimant/Defendant ECKARD BRANDES, INC.'s claims against Counterclaim Defendant KAMAAINA PUMPING, a Hawaii General Partnership having been dismissed by Order entered October 22, 1999;

WHEREAS Counterclaimant/Defendant ECKARD BRANDES, INC. represented that it elects remedy of disgorgement in open court;

WHEREAS remaining claims, Counterclaimant/Defendant ECKARD BRANDES, INC.'s Count II (Breach of Fiduciary Duty of Loyalty) and Count V(Punitive Damages & Attorneys' Fees) and Plaintiff/Counterclaim Defendant RANDELL A. RILEY's claims came for trial on November 18, 1999 before this Court, and the issues have been duly tried and heard and the decision having been duly rendered;

WHEREAS the Report of Special Master on Defendant's Motion for Attorney's Fees and Prejudgment Interest and Plaintiffs' Motion for Review of Taxation of costs by the Clerk, entered on July 10, 2000, although made in violation of automatic stay, was subsequently ratified by this court after the lifting of the automatic stay as to Plaintiff/Counterclaim Defendant RANDELL A. RILEY and Plaintiff/Counterclaim Defendant LEE T. KUNIMITSU;

WHEREAS the said Special Mater's Report awarded Counterclaimant/Defendant ECKARD BRANDES, INC. attorneys' fees of $87,785.63 and Pre-judgment Interest of $140,457.00 and Costs of $10,934.57 (Total of $239,177.20) against Plaintiff/Counterclaim Defendant RANDELL A. RILEY and Plaintiff/Counterclaim Defendant LEE T. KUNIMITSU, but Counterclaimant/Defendant ECKARD BRANDES, INC.'s award by the Special Master was not joint and several against Plaintiff/Counterclaim Defendant RANDELL A. RILEY and Plaintiff/Counterclaim Defendant LEE T. KUNIMITSU and thus Plaintiff/Counterclaim Defendant RANDELL A. RILEY and Plaintiff/Counterclaim Defendant LEE T. KUNIMITSU should each pay to Counterclaimant/Defendant ECKARD BRANDES, INC. according to their respective ratio of total disgorgement amount, i.e., 51.78531% for Plaintiff/Counterclaim Defendant RANDELL A. RILEY and 48.21468% for Plaintiff/Counterclaim Defendant LEE T. KUNIMITSU.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Counterclaimant/Defendant ECKARD BRANDES, INC. and against Plaintiff/Counterclaim Defendant RANDELL A. RILEY and LEE T. KUNIMITSU for the following amounts, representing damages for Plaintiffs/Counterclaim Defendant's breach of the duty of loyalty:

RANDELL A. RILEY: $181,840.26
LEE T. KUNIMITSU: $169,302.27

AND IT IS HERBY FUTHER ORDERED that judgment is entered against Plaintiff/Counterclaim Defendant RANDELL A. RILEY and LEE T. KUNIMITSU for the following additional amounts, representing the proportionate share of $87,785.63 awarded by the Special Master for attorneys' fees, in favor of Defendant/Counterclaimant ECKARD BRANDES, INC.

RANDELL A. RILEY: $45,460.06
LEE T. KUNIMITSU: $42,325.56

AND IT IS HERBY FUTHER ORDERED that judgment is entered against Plaintiff/Counterclaim Defendant RANDELL A. RILEY and LEE T. KUNIMITSU for the following additional amounts, representing the proportionate share of $140,457.00 awarded by the Special Master for prejudgment interest, in favor of Defendant/Counterclaimant ECKARD BRANDES, INC.:

RANDELL A. RILEY: $72,736.10
LEE T. KUNIMITSU: $67,720.90

AND IT IS HERBY FUTHER ORDERED that judgment is entered against Plaintiff/Counterclaim Defendant RANDELL A. RILEY and LEE T. KUNIMITSU for the following additional amounts, representing the proportionate share of $10,934.57 awarded by the Special Master for costs, in favor of Defendant/Counterclaimant ECKARD BRANDES, INC.:

RANDELL A. RILEY: $5,662.51
LEE T. KUNIMITSU: $5,272.07

Counterclaimant/-Defendant ECKARD BRANDES, INC. takes nothing, and the counterclaim is dismissed on the merits as to Counterclaim Defendant KAMAAINA PUMPING.

Plaintiff/Counterclaim Defendant RANDELL A. RILEY and Plaintiff/Counterclaim Defendant LEE T. KUNIMITSU take nothing on their claims for wage and hour and that the action be dismissed on the merits.

Statutory post-judgment interest shall be in accordance with Haw.Rev. Stat. 478-3, and shall begin to accrue on all amounts except for prejudgment interest, from the date of the original judgment, February 24, 2000.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii 9-20-00.

s/ Helen Gilmore
HELEN GILLMOR
United States District Judge

Randell A. Riley, et al. v. Eckard Brandes, Inc., Civil No. 98-00779 HG; Amended Judgment

Appendix I

***Judgment in a Civil Case* dated February 24, 2000 by J. Gillmore; *Riley et al. v. Eckard Brandes, Inc.*, (Civil No. 98-0779, USDC, D.Haw.)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RANDELL A. RILEY and LEE T. KUNIMITSU
Plaintiffs,

v.

ECKARD BRANDES, INC.,
Defendant.

and

All related claims.

Civil No. 98-0779 HG

Judgment In A Civil Case

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[√] Decision by Court. This action came for consideration before the Court. The issues have been

considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered pursuant to the "Order Granting Defendant and Counterclaimant Eckard Brandes, Inc.'s Motion for Summary Judgment on the Amended Complaint and Order Granting in Part and Denying in Part Plaintiffs/Counterclaim Defendants Randell A. Riley, Lee T. Kunimitsu and Kamaaina Pumping's Motion for Partial Summary Judgment as to Counterclaims for Count I - Breach of Contract, Count II - Breach of Duty of Employee Loyalty and Count III - Misappropriation of Trade Secrets and Order Granting Defendant's Motion for Summary Judgment on Count II of the Counterclaim and Order Denying Plaintiffs/Counterclaim Defendants Randeli A. Riley, Lee T. Kunimitsu and Kamaaina Pumping's Motion for Certification of Question of State Law to the Hawaii Supreme Court and Stay pending State Court's Decision" filed on October 22, 1999, and pursuant to the "Findings of Fact and Conclusions of Law and Order" filed on February 9, 2000.

cc: Randall N. Harakal, Esq.
Elena J. Onaga, Esq.

Date February 24, 2000

WALTER A.Y.H. CHINN
Clerk
s/deputy clerk

(By) Deputy Clerk

Appendix J

Statutory Provisions

Hawaii Revised Statutes, §103D-704.

§103D-704 Exclusivity of remedies.
The procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, a suspension or debarment proceeding, or in connection with a contract controversy, to resolve their claims or differences. The contested case proceedings set out in chapter 91 shall not apply to protested solicitations and awards, debarments or suspensions, or the resolution of contract controversies.
[L Sp 1993, c 8, pt of §§2; am L 1997, c 352, §§23]

Hawaii Revised Statutes, §103D-705

§ 103D-705 Solicitations or awards in violation of law.
The provisions of section 103D-706 and section 103D-707 apply where it is determined by the chief procurement officer or a designee under section 103D-701 or 103D-703 or where it is determined administratively under section 103D-709, or upon judicial review under section 103D-710 or judicial action under section 103D-711, that a solicitation or award of a contract is in violation of the law.
[L Sp 1993, c 8, pt of § 2; am L 1999, c 162, § 4]

Hawaii Revised Statutes, §103D-709

§ 103D-709 Administrative proceedings for review. (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701 or 103D-702.

(b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the supreme court under section 103D-710.

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(f) may initiate a proceeding under this section. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all

issues involved. The rules of evidence shall apply.

(d) The hearings officers shall ensure that a record of each proceeding which includes the following is compiled:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings of fact;

(5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710.

(e) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement was previously stayed under section 103D-701(f).

(f) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

(g) The policy board shall adopt such other rules as may be necessary to ensure that the proceedings conducted

pursuant to this section afford all parties an opportunity to be heard.

[L Sp 1993, c 8, pt of § 2; am L 1997, c 352, pt of § 24; am L 1999, c 162, § 7]

Hawaii Revised Statutes, §602-5

§ 602-5 Jurisdiction and powers.
The supreme court shall have jurisdiction and powers as follows:

(1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it on any appeal allowed by law from any other court or agency;

(2) To answer, in its discretion, any question of law reserved by a circuit court, the land court, or the tax appeal court, or any question or proposition of law certified to it by a federal district or appellate court if the supreme court shall so provide by rule;

(3) To entertain, in its discretion, any case submitted without suit when there is a question in difference which might be the subject of a civil action or proceeding in the supreme court, circuit court, or tax appeal court, and the parties agree upon a case containing the facts upon which the controversy depends;

(4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or

if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law;

(5) To issue writs of habeas corpus, or orders to show cause as provided by chapter 660, returnable before the supreme court or a circuit court, and any justice may issue writs of habeas corpus or such orders to show cause, returnable as above stated;

(6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court;

(7) To make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

(8) All cases addressed to the jurisdiction of the supreme court or of the intermediate appellate court shall be filed with the supreme court as shall be provided by rule of court. The chief justice or the chief justice's designee from any of the associate justices or the intermediate appellate judges, shall receive each case and shall assign the case either to the intermediate appellate court or to the supreme court within twenty days of the filing deadline for the last document permissible to be filed in the case pursuant to court

rule.

(9) The supreme court may order the immediate reassignment of a case to itself after its assignment to the intermediate appellate court whenever the supreme court in its discretion deems that the case concerns an issue of imperative or of fundamental public importance.
[L 1892, c 57, § 51; RL 1925, § 2224; RL 1935, § 3593; RL 1945, § 9604; RL 1955, § 214-4; HRS § 602-5; am L 1972, c 88, § 2(b); am L 1979, c 111, pt of § 2; am imp L 1984, c 90, § 1; am L 1986, c 199, § 1]

Hawaii Revised Statutes, §636-14

§ 607-14 Attorneys' fees in actions in the nature of assumpsit, etc.
In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed.

Where the note or other contract in writing provides for a rate less than twenty-five per cent, not more than the specified rate shall be allowed.

Where the note or other contract in writing provides for the recovery of attorneys' fees incurred in connection with a prior debt, those attorneys' fees shall not be allowed in the immediate action unless there was a writing authorizing those attorneys' fees before the prior debt was incurred. "Prior debt" for the purposes of this section is the principal amount of a debt not included in the immediate action.

The above fees provided for by this section shall be assessed on the amount of the judgment exclusive of costs and all attorneys' fees obtained by the plaintiff, and upon the amount sued for if the defendant obtains judgment.

Nothing in this section shall limit the ecovery of reasonable attorneys' fees and costs by a planned community association and its members in actions for the collection of delinquent assessments, the foreclosure of any lien, or the enforcement of any provision of the association's governing documents, or affect any right of a prevailing party to recover attorneys' fees in excess of twenty-five per cent of the judgment pursuant to any statute that specifically provides that a prevailing party may recover all of its reasonable attorneys' fees. "Planned community

association" for the purposes of this section means a nonprofit homeowners or community association existing pursuant to covenants running with the land.
[L 1872, c 29, § 5; RL 1925, § 2551; RL 1935, § 3800; am L 1935, c 26, § 1; RL 1945, § 9754; RL 1955, § 219-14; HRS § 607-14; am L 1972, c 88, § 5(q); am L 1993, c 200, § 1; am L 1994, c 74, § 1; am L 1997, c 132, § 2]

Hawaii Revised Statutes, §636-16

§ 636-16. Awarding interest.
In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred.
[L 1979, c 78, § 2]

Hawaii Revised Statutes, §657-1

§ 657-1 Six years.
The following actions shall be commenced within six years next after the cause of action accrued, and not after:

(1) Actions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court; excepting further that actions for the recovery of any debt founded upon any contract, obligation, or liability made pursuant to chapter 577A shall be governed by

chapter 577A;

(2) Actions upon judgments or decrees rendered in any court not of record in
the State, or, subject to section 657-9, in any court of record in any foreign jurisdiction;

(3) Actions for taking or detaining any goods or chattels, including actions in the nature of replevin;

(4) Personal actions of any nature whatsoever not specifically covered by the laws of the State.
[CC 1859, § 1036; am imp L 1907, c 113, § 1; am L 1913, c 19, § 1; RL 1925, § 2639; RL 1935, § 3910; am L 1943, c 139, § 1; RL 1945, § 10421; RL 1955, § 241- 1; am L 1965, c 139, § 1; HRS § 657-1; am L 1972, c 105, § 1(a); am L 1978, c 109, § 3]

Hawaii Revised Statutes, §657-7

§ 657-7 Damage to persons or property.
Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13.
[L 1907, c 113, § 1; am L 1913, c 19, § 1; RL 1925, § 2645; RL 1935, § 3916; RL 1945, § 10427; RL 1955, § 241-7; am L 1957, c 138, § 1; HRS § 657-7; am L 1972, c 105, § 1(e)]

Hawaii Rules of Appellate Procedures, Rule 13

RULE 13. Certification of question of Hawaii law by federal courts.

(a) When certified. When a federal district or appellate court certifies to the Hawaii Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court may answer the certified question by written opinion.

(b) Contents of certificate. The certificate provided for herein shall contain the title of the Hawaii Supreme Court and the title of the cause in full, and to the right thereof the words "Certified Question" and the name of the court submitting or approving the submission of the question. The certificate shall also contain a statement of prior proceedings in the case, a statement of facts showing the nature of the cause, the question of law to be answered, and the circumstances out of which the question arises.

(c) Preparation of certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared, and signed by the presiding judge of such federal court, it shall be certified to the Hawaii Supreme Court by the clerk of the federal court and under its official seal. The Hawaii Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with the certificate.

(d) Briefs. Briefs conforming to the Hawaii Rules of Appellate Procedure shall be filed by the parties within the times provided by these rules as if the certificate was a notice of appeal under these rules.

(e) Oral argument. Unless otherwise ordered by the Hawaii Supreme Court, oral arguments conforming to its rules will be allowed.

(Amended June 9, 1986, effective June 9, 1986.)